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THE Editor of this Edition has been deprived of the invaluable co-operation of Mr. Justice Day, who, owing to his elevation to the Bench, is prevented from taking the same part in its preparation, that he did in respect of the three previous Editions of the work.

The general arrangement is unaltered. Several Statutes have, however, been recently passed, which have made considerable alterations in the law to which they relate, or have codified it, viz.:—the Banker's Books Evidence Act, 1879, the Employer's Liability Act, 1880, the Conveyancing and Law of Property Act, 1881, the Married Women's Property Act, 1882, the Bills of Sale Act (1878) Amendment Act, 1882, the Bills of Exchange Act, 1882, the Agricultural Holdings (England) Act, 1883, the Patents, Designs, and Trade Marks Act, 1883, and the Bankruptcy Act, 1883. The matters to which these Statutes refer, have in consequence been re-arranged. The Rules of the Supreme Court, 1883, have also been incorporated throughout.

In order to afford space, for the introduction of the very large number of cases, which have been added, it has been deemed more convenient, in the present Edition, somewhat to increase the size of the page, and definitely to divide the book into two volumes.

M. P.

TEMPLE,
July, 1884.

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ADDENDA AND CORRIGENDA.

. The reader is requested to insert the cases on the following pages, and note the errors therein mentioned in their proper places in the work. The cases have, for convenience of removal, been printed on one side only.

These addenda and corrigenda are referred to by the letters "Add," followed by the page to which the particular addendum refers.

Page 76, line 16 from bottom.

Add, "*Bradlaugh v. Gossett*, 12 Q. B. D. 271."

„ 78, line 9.

Add, "*Cooper v. Moon*, W. N., 1884, p. 78, Field, J.; *Cooke v. Wilby*, 25 Ch. D. 769, cited *post*, *Add*. p. 109."

„ 79, line 26 from bottom.

Add, "In construing a marine policy, the Court will take judicial notice of what appears on the admiralty chart of the portion of the sea to which the insurance relates. *Birrell v. Dryer*, 9 Ap. Ca. 345-347, 353, D. P."

„ 89, line 17.

Add, "By order in Council, of June 26th, 1884, Warwickshire has been divided into two divisions."

„ 109, line 4 from bottom.

Add, "By Rules, 1883, O. xxxviii. r. 6, *ante*, pp. 77, 78, affidavits may be sworn in Her Majesty's dominions in foreign parts before any judge, court, notary public, or person lawfully authorized to administer oaths, or in other foreign parts, before any of Her Majesty's consuls or vice-consuls, and judicial notice is to be taken of their seal or signature. By 21 & 22 Vict. c. 95, s. 31, where there are no consuls or other persons mentioned in 18 & 19 Vict. c. 42, s. 3, *ante*, p. 77, an affidavit, for use in the Court of Probate, might be made 'before any foreign local magistrate, or other person, having authority to administer an oath.' This provision is now extended by J. Act, 1873, s. 76, to all divisions of the High Court. *Cooper v. Moon*, W. N., 1884, p. 78; in which case Field, J., allowed the filing of an affidavit sworn before a notary where there was no British consul. The decision of Chitty, J., in *Cooke v. Wilby*, 25 Ch. D. 769, is founded on the practice in Court of Chancery."

„ 127, line 16.

Add, "See *Wright v. Sanderson*, 53 L. J., P. D. & A. 49, C. A."

„ 139, line 17.

Add, "See also *Wright v. Sanderson*, 53 L. J., P. D. & A. 49, C. A."

„ 148, line 23.

For "*Medan*," read "*Maden*."

„ 161, line 12.

To "*Kennedy v. Lyell*," *add*, "affirmed, 9 Ap. Ca. 81, D. P."

„ 162, line 19 from bottom.

Add, "See further, *Reg. v. Cox*, W. N. 1884, p. 162, Q. B. D."

„ 180, line 22.

Add, "*Priestman v. Thomas*, 9 P. D. 70, affirm. in C. A., W. N. 1884, p. 143."

„ 214, line 18 from bottom.

For "sect. 17 (2 a)," read "sect. 15 (2 a)."

„ 231, line 8 from bottom.

For "*Denman*," read "*Henman*."

„ 234, lines 2, 3.

For "sect. 15 (2 b), *ante*, p. 216," read "sect. 15 (2 a), *ante*, p. 214."

„ 262, line 19 from bottom.

Add, "It has however since been decided that consent, given by counsel, by the authority of his client, to an order, there being no mistake or surprise, cannot be arbitrarily withdrawn, although the order has not been drawn up. *Harvey v. Croydon Sanitary Authority*, 26 Ch. D. 249, C. A."

„ 274, line 17.

For "no longer," read "still."

„ 274, line 20.

Add, "*Vide post*, p. 908."

Page 275, lines 15-19.

For paragraph, "As the decision . . . O. lxx. r. 1 (c)," substitute the following, "The jurisdiction of the judge or Court to interfere, by order, with the rule of costs of an action tried with a jury, only arises where there is 'good cause;' an appeal therefore lies from such order to the C. A. *Jones v. Curling*, 53 L. J., Q. B. D. 373, C. A."

.. 275, line 14, from bottom.

Add, "See also *Pearson v. Ripley*, 50 L. T. 629, Q. B. D.; *Waring v. Pearman*, *Id.* 633."

.. 275, line 26.

Add, "See also *Goutard v. Carr*, 53 L. J., Q. B. D. 55, C.A."

.. 275, line 3 from bottom.

Add, "The assessment of damages by a jury where judgment has been signed against the defendant by default, is not within the proviso, and the costs do not follow the event. *Gath v. Howarth*, W. N. 1884, p. 99, Field, J."

.. 276, line 26.

Add, "The liability of C. to costs is not affected by the County Courts Act, 1867, s. 5, *infra*. *Bates v. Burchell*, W. N. 1884, p. 108, Field, J."

.. 276, line 7 from bottom.

Add, "So where an application for judgment was made under O. xiv., and the jury have negatived the defence set up by the defendant, on which he obtained leave to defend. *Copley v. Jackson*, W. N. 1884, p. 94, Field, J."

.. 278, line 19.

Add, "Sect. 5 does not apply to third party costs. *Bates v. Burchell*, W. N., 1884, p. 108, Field, J."

.. 282, line 7.

Add, "*Ex pte. Theys*, 25 Ch. D. 587, C. A.; *Walker v. Bradford Old Bank*, 12 Q. B. D. 511."

.. 296, line 18 from bottom.

Dele "D."

.. 299, line 6.

Add, "See also *Heywood v. Mallalieu*, 25 Ch. D. 357."

.. 300, line 3 from bottom.

Add, "*Palmer v. Johnson*, was affirmed in C. A., 53 L. J., Q. B. D. 348, overruling *Manson v. Thacker*, *Besley v. Besley*, *Allen v. Richardson*, and the judgment of *Williams, J.*, in *Jolliffe v. Baker*, cited pp. 300, 301."

.. 301, line 22.

Add, "See further *Howe v. Smith*, 50 L. T., 573, C. A."

.. 305, line 9.

Add, "One joint tenant, or tenant in common, can demise his interest at a rent, to another joint tenant, or tenant in common. *Couper v. Fletcher*, *Leigh v. Dickeson*, cited *post*, p. 987."

.. 316, line 22.

Add, "As to liability of tenant in common of a house, to contribute to expense of repairs done by his co-tenant, see *Leigh v. Dickeson*, 12 Q. B. D. 194, cited *post*, p. 532."

.. 329, line 7.

Add, "The Bank Holidays Act, 1871, 34 & 35 Vict. c. 17, s. 1, appoints as bank holidays Easter Monday, Whitsun Monday, the first Monday in August, and December 26th, if a week day. If it be a Sunday, then the holiday is December 27th; 38 & 39 Vict. c. 13, s. 2. By 34 & 35 Vict. c. 17, s. 5, these days may in any year be altered by Order in Council; and Her Majesty may by proclamation appoint other days to be kept as bank holidays (sect. 4)."

Page 335, line 17.

To "*Carter v. White*," add reference, "25 Ch. D. 666."

„ 348, line 13.

Add, "See sect. 49 (13), *infra*, as to notice by an agent in whose hands a bill of exchange is dishonoured."

„ 349, line 20.

Add, "As to what are holidays under the Bank Holidays Acts, *vide Add.* 329."

„ 355, last line.

For "on," read "an."

„ 372, line 2.

To "*McLean v. Clydesdale Banking Co.*," add reference, "9 Ap. Ca. 95."

„ 382, line 28.

Add, "*Stock v. Inglis*, was reversed in C. A., 12 Q. B. D. 564."

„ 411, line 17 from bottom.

Add, "*Accord. City Bank v. Sovereign Life Assur. Co.*, 50 L. T. 565, Ch. D."

„ 416, line 11 from bottom.

Add, "*Burdick v. Sewell*, was reversed in C. A., and is reported, 13 Q. B. D. 159."

„ 420, line 6 from bottom.

Add, "*Coverdale v. Grant*, was affirmed in D. P. and is noted, W. N., 1884, p. 79."

„ 426, line 5 from bottom.

To "*Tattersall v. National S. Ship Co.*," add reference, "12 Q. B. D. 297."

„ 427, line 8 from bottom.

Add, "*Tattersall v. National S. Ship Co.*, 12 Q. B. D. 297."

„ 428, line 14 from bottom.

To "*Gullischen v. Stewart*," add reference, "53 L. J., Q. B. D. 173, C. A."

„ 435, line 3 from bottom.

Add, "See also *Carter v. White*, 25 Ch. D. 666, C. A."

„ 443, line 17 from bottom.

Add, "*W. London Commercial Bank v. Kitson*, was affirmed in C. A., and is reported, 53 L. J., Q. B. D. 345."

„ 454, line 27.

Add, "*Ingle v. McCutchan*, 12 Q. B. D. 518."

„ 489, line 3.

Add, "*Mersey Steel & Iron Co. v. Naylor*, was affirmed in D. P., and is noted, W. N., 1884, p. 97."

„ 530, line 9.

Add, "*Read v. Anderson*, was affirmed in C. A. (*diss.* Brett, M. R.), and is noted, W. N., 1884, p. 140."

„ 530, line 22.

For "512," read, "518."

„ 538, line 30.

To "*In re Cape Breton Co.*," add reference, "26 Ch. D. 221."

„ 552, line 23.

To "*Burlinson v. Hall*," add reference, "12 Q. B. D. 347."

„ 578, line 6 from bottom.

Add, "*The Notting Hill*, 9 P. D. 105, C. A."

- Page 588, line 17.
Add, "Beer v. Foakes, was affirmed in D. P., and is noted, W. N., 1884, p. 125."
- „ 593, line 23 from bottom.
For "14," read, "1st."
- „ 594, line 24.
Add, "Read v. Anderson, was affirmed in C. A. (diss. Brett, M. R.), and is noted, W. N., 1884, p. 140."
- „ 598, line 16.
To "Vallance v. Blagden," add reference, "26 Ch. D. 353."
- „ 599, line 9.
To "Meakin v. Morris," add reference, "12 Q. B. D. 352."
- „ 603, line 18 from bottom.
Add, "See, however, post, p. 1133."
- „ 607, line 8.
Add, "Green v. Humphreys, was however reversed in C. A., and is reported, 53 L. J., Ch. D. 625."
- „ 621, line 1.
Add, "L. & County Bank v. Terry, 25 Ch. D. 692, C. A."
- „ 650, line 16.
Add, "Rolls v. Miller, was affirmed in C. A., and is reported 50 L. T., 697, C. A."
- „ 656, line 2 from bottom.
Add, "Wilkinson v. Collyer, 13 Q. B. D. 1."
- „ 676, line 23 from bottom.
For "duty" read "law."
- „ 677, line 5 from bottom.
Add, "See also R. v. Williams, 9 Ap. Ca. 418, P. C."
- „ 692, line 14,
Add, "The Warkworth was affirmed in C. A., and is noted, W. N., 1884, p. 162."
- „ 695, line 14 from bottom.
To "Whalley v. Lancashire & Yorkshire Ry. Co.," add reference, "13 Q. B. D. 131, C. A."
- „ 703, last line.
Add, "Griffiths v. London & S. Katherine Docks Co., is reported, 12 Q. B. D. 493, and was affirmed in C. A., W. N. 1884, p. 156."
- „ 706, line 13.
Add "Morgan v. L. General Omnibus Co., was affirmed in C. A., and is reported, 53 L. J., Q. B. D. 352."
- „ 709, line 26.
Add, "In The Vera Cruz, 9 P. D. 96, C. A., however, it was held that an action in rem would not lie under Ld. Campbell's Act, against a foreign ship."
- „ 712, line 21 from bottom.
Add, "Bell v. Love, was affirmed in D. P., and is reported 9 Ap. Ca. 286."
- „ 713, line 13 from bottom.
Add, "As to the effect of the statute of limitations, see Mitchell v. Darley Main Colliery Co., W. N. 1884, p. 163, C. A."
- „ 735, last line.
Add, "Kensit v. Gt. E. Ry., was affirmed in C. A., and is noted W. N. 1884, p. 156."
- „ 749, line 19.
To "Ager v. Peninsular & Oriental Steam Navigation Co.," add reference, "53 L. J., Ch. D. 589."

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Page 753, line 24.

Add, "Duck v. Bates, was affirmed in C. A., and is reported, 53 L. J., Q. B. D. 338."

„ 754, line 14.

To "Nichols v. Pitman," add reference, "26 Ch. D. 374, C. A."

„ 762, line 23.

Add, "Wittman v. Oppenheim, W. N., 1884, p. 122, Pearson, J."

„ 764, line 6 from bottom.

To "Leonard v. Wells," add reference, "26 Ch. D. 238, C. A."

„ 766, line 16.

To "In re Anderson's Trade-Mark," add reference, "26 Ch. D. 409, C. A."

„ 779, line 21.

Add, "Accord. Smith v. Chadwick, 9 Ap. Ca. 187, 189, 192, et seq., per Ld. Blackburn."

„ 780, line 17 from bottom.

To "Smith v. Chadwick," add reference, "9 Ap. Ca. 187, D. P."

„ 795, last line.

Add, "So, to restrain the utterance of slanderous statements, of the plaintiff, to the like effect. Looy v. Bean, 26 Ch. D. 306, C. A."

„ 831, line 14.

Add, "See further, Heawood v. Bone, 13 Q. B. D. 179."

„ 856, line 29.

Add, "And the district board cannot prevent wires being placed across the street, at such a height above it, as not to interfere with the traffic. Wandsworth District Board of Works v. United Telephone Co., W. N. 1884, p. 148, C. A."

„ 884, line 21 from bottom.

Add, "Ex pte. Gould, W. N. 1884, p. 154, Q. B. D."

„ 996, line 6.

Add, "See Ex pte. Cunningham, W. N., 1884, p. 144, C. A."

„ 996, line 17.

Add, "A married woman may carry on a separate trade while residing with her husband; Ashworth v. Outram, 5 Ch. D. 923, C. A.; Lovell v. Newton, 4 C. P. D. 7, but if he take such a part in the trade as to make himself personally responsible, it is not such a separate business; Laporte v. Costick, 31 L. T. 434, M. T., 1874, Q. B."

„ 1001, line 18 from bottom.

Add, "See also Ex pte. Barter, W. N., 1884, p. 138, C. A."

Where a testator directs his trade to be carried on after his death, that part of his assets only, will be liable in case of the bankruptcy of the executor and trustee of his will, which he has directed to be embarked in the trade. Ex pte. Garland, 10 Ves. 110; Thompson v. Andrews, 1 Myl. & K. 116. See Shearman v. Robinson, 15 Ch. D. 548; Fraser v. Murdoch, 6 Ap. Ca., 855, D. P.; and Strickland v. Symons, 26 Ch. D. 245, C. A."

„ 1005, line 9 from bottom.

Add, "Casson v. Churchley, 53 L. J., Q. B. D. 335, is to the like effect."

„ 1016, line 5 from bottom.

Add "Ex pte Chaplin, 26 Ch. D. 319, C. A."

To "Ex pte. Johnson," add reference, "26 Ch. D. 333, C. A."

„ 1025, line 15 from bottom.

Add, "Nor is a 'balance order,' made in the voluntary winding up of a company, on a contributory, for the payment of calls, made on him before the commencement of the winding up. Ex pte. Whinney, W. N. 1884, p. 154, Q. B. D."

Page 1025, line 15, from bottom.

To "*Ex pte. Schmitz*," add reference, "12 Q. B. D. 509."

Add, "The creditor must be in a position to issue execution on his judgment: hence an executor cannot issue a bankruptcy notice on the judgment obtained by his testator, until he has obtained leave under Rules, 1883, O. xlii. r. 23, to issue execution. *Ex pte. Woodall*, W. N. 1884, p. 156, C. A."

„ 1025, line 10 from bottom.

To "*Ex pte. Matthew*," add reference, "12 Q. B. D. 506."

„ 1025, last line.

Add, "The notice that the debtor has or is about to suspend payment of his debts need not be in writing; an oral statement to that effect to a creditor in conversation with him is sufficient. *Ex pte. Nickoll*, W. N. 1884, p. 154, Q. B. D. A statement of inability to pay debts is, however, insufficient. *Ex pte. Oastler*, W. N. 1884, p. 162, C. A."

„ 1034, line 9.

Add, "*Ex pte. Harrison*, W. N. 1884, p. 114, was affirmed in C. A., and is noted *Id.*, p. 169."

„ 1060, line 5.

To "*France v. Clark*," add reference, "26 Ch. D. 257, C. A."

„ 1075, line 3 from bottom.

To "*Show v. Port Phillip, &c. Mining Co.*," add reference, "13 Q. B. D. 103."

„ 1133, line 16 from bottom.

Add, "As to the form of judgment, see *Bursill v. Tanner*, 50 L. T., 589, Q. B. D."

„ 1137, line 13.

Add, "*Secus, Weldon v. Riviere*, W. N. 1884, p. 154, Q. B. D. The point seems not to have been raised in *Weldon v. Neal*, *Id.* p. 153."

„ 1137, line 23.

Add, "See *Bursill v. Tanner*, *Add.* p. 1133. In respect of torts committed against a married woman during coverture, the Statute of Limitations, 21 Jac. 1, c. 16, by reason of the proviso in sect. 7, *ante*, p. 605, runs only from the commencement of the Married Women's Property Act, 1882, Jan. 1st, 1883. *Weldon v. Neal*, W. N. 1884, p. 153, Q. B. D. The point was not however raised whether the action was maintainable, *vide supra*."

„ 1154, line 25 from bottom.

To "*Ex pte. Hunt*," add reference, "13 Q. B. D. 36."

„ 1154, line 20 from bottom.

To "*Ex pte. Johnson*," add reference, "26 Ch. D. 338, C. A."

„ 1156, line 24 from bottom.

Add, "And these sections are still in force as to bills of sale not given as a security for money. *Casson v. Churchley*, 53 L. J., Q. B. D. 335."

„ 1158, line 21 from bottom.

To "*Ex pte. Johnson*," add reference, "26 Ch. D. 338, C. A."

„ 1159, line 20 from bottom.

Add, "*Casson v. Churchley*, 53 L. J., Q. B. D. 335."

„ 1159, last line.

Add, "*Melville v. Stringer*, was reversed in C. A. and is noted W. N. 1884, p. 162."

„ 1167, line 4.

For "execution creditor is not liable to poundage," read, "the sheriff is not entitled to poundage. *Ex pte. Warwickshire, the Sheriff of*, W. N. 1884, p. 152, Bky."

DIGEST OF THE LAW OF EVIDENCE

AT NISI PRIUS.

PART I.

EVIDENCE IN GENERAL.

IN forming a digest of the law of evidence, the subject may be considered with regard to, first, the *nature* of evidence; secondly, the *object* of evidence; thirdly, proof of *documentary evidence*; fourthly, proof by *witnesses*; fifthly, proof by *affidavits or depositions*, and sixthly, the *effect* of evidence.

It will be well here to premise that the Supreme Court of Judicature Acts, 1873, 1875,* do not, nor may any rules made thereunder, alter the rules of evidence, except in empowering the court or a judge to order that in certain cases affidavits or depositions may be used in lieu of oral evidence, J. Act, 1875, s. 20, *post*, p. 143, and see Rules of the Supreme Court, 1883,† O. xxxvii. and O. xxxviii.

NATURE OF EVIDENCE.

With regard to its nature, evidence may be considered under the following heads:—Primary evidence; secondary evidence; presumptive evidence; hearsay; admissions.

PRIMARY EVIDENCE.

It is a general rule, that the best evidence, or rather the highest kind of evidence, must be given of which the nature of the case admits; and evidence of a nature which supposes better proof to be withheld is only secondary evidence. Thus, where a will of lands was to be proved, the primary evidence of it is the will itself, and not the probate; for the ecclesiastical court had no cognizance of realty. B. N. P. 246. So, in general, where a contract has been reduced into writing by the parties, the writing is the best evidence of its contents, and must be produced. *Fenn v. Griffiths*, 6 Bing. 533. So where a person was engaged as secretary on the terms contained in a resolution entered in a certain book of the employer, in action for his salary the book must be produced. *Whitford v. Tutin*, 10 Bing. 395, cited *post*, p. 3. In an action for infringement of a musical composition, the defendant cannot ask a witness whether he has not seen

* These Acts are hereinafter cited, for brevity, as J. Acts, 1873, 1875.

† These rules (see preamble and Appendix O) came into force on October 24th, 1883, and replace all former rules, except R. G. H. T. 1853, rr. 44 to 49, relating to juries, but they provide by O. lxxii. r. 2, that, "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." They are hereinafter cited as Rules, 1883.

printed copies of it at a certain place and time, or heard it performed, in order to disprove the originality; such copies, if any, must be produced and proved, or inability to produce them shown. *Boosey v. Davidson*, 13 Q. B. 257.

But it is not universally necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, the fact may yet be proved by oral evidence. Thus, a receipt for money will not exclude oral evidence of the payment. *Rambert v. Cohen*, 4 Esp. 213. So, where, in trover, the witness stated that he had orally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, *Ld. Ellenborough* ruled that it was not necessary that the writing should be produced. *Smith v. Young*, 1 Camp. 439. In the same manner, what a party says, admitting a debt, is evidence, although the promise to pay is reduced into writing. *Singleton v. Barrett*, 2 C. & J. 369. So where the fact to be proved was, that a certain person occupied land so as to gain a settlement by 13 & 14 Car. 2, it was held that, although there was a written demise, the fact might be proved by oral evidence. *R. v. Holy Trinity*, 7 B. & C. 611; 1 M. & Ry. 444. But the parties to the lease, the amount of rent, and the terms of the tenancy can only be shown by the writing. S. C.; *Strother v. Barr*, 5 Bing. 136; *R. v. Merthyr Tydvil*, 1 B. & Ad. 29. In an action *inter alios*, the landlord cannot be called to prove the rent due without producing the written lease, if there is one. *Augustien v. Challis*, 1 Exch. 279. And the fact of a tenancy under a particular person, cannot be so proved, where there is a writing. *Doe v. Harvey*, 8 Bing. 239; *semb. contra, per Alderson, B.*, in *Augustien v. Challis, supra*. Although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Alderson v. Clay*, 1 Stark. 405. The fact of the employment of an agent to sell may be proved by oral evidence, though the terms of his commission are contained in a letter. *Semb. Whitfield v. Brand*, 16 M. & W. 282. Where it is necessary to prove a marriage, the entry in the parish register is not the only evidence; but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or by general reputation. *Evans v. Morgan*, 2 C. & J. 453; *R. v. Wilson*, 3 F. & F. 119; *Campbell v. Campbell*, L. R., 1 H. L. Sc. 201, *per Ld. Cranworth*. And where evidence of reputation was given, proof of a fiat for a special licence and of the affidavit on which it was founded, and of an entry in a parish register stating a private marriage in a house, purporting to be signed by the parties, was admitted to confirm the other evidence. *Doe d. El. of Egremont v. Grazebrook*, 4 Q. B. 406. On an indictment for an unlawful assembly, the inscriptions and devices on banners displayed at a public meeting may be proved by oral evidence, and it is not necessary to produce the banners themselves. *R. v. Hunt*, 3 B. & A. 566. And the transactions and proceedings of such a meeting may be proved by oral evidence, as resolutions entered into; although it should appear that those resolutions were read from a paper. *Id.* 568. So an inscription on a fixed monument, or writing on a wall, may be proved by oral evidence. *Doe d. Coyle v. Cole*, 6 C. & P. 359; *Mortimer v. McCallan*, 6 M. & W. 68, 72, *per cur.*; *Sayer v. Glossop*, 2 Exch. 409; *Bartholomew v. Stephens*, 8 C. & P. 728.

The admission of one of the parties to a suit is *primary* evidence as against him, and the reported cases which favour a contrary opinion must be considered as overruled by *Slatterie v. Pooley*, 6 M. & W. 664, where it was decided that oral admissions are evidence against the party making them, although they relate to the contents of a written instrument. See also *Newhall v. Holt, Id.*, 662; and *Henman v. Lester*, 12 C. B., N. S. 776; 31

L. J., C. P. 366. So a copy of a document delivered by a party is primary evidence against him of that document. See *Stowe v. Querner*, L. R., 5 Ex. 155, 159; and further under tit. *Admissions*, post, p. 61, et seq.

The proper evidence of all judicial proceedings is the production of the proceedings themselves or of examined (or office, Rules, 1883, O. xxxvii. r. 4, vide post, p. 92) copies of them. *Thellusson v. Shedden*, 2 N. R. 228. It has even been held that oral evidence was not admissible of the day on which a cause came on to be tried; as the proper proof is the postea. *Thomas v. Ansley*, 6 Esp. 80; *R. v. Page*, Id. 83. But as adjournments during sitting are not noticed on the record, it may well happen that oral evidence is the best and only evidence of the actual day of trial; *Roe d. Wrangham v. Hersey*, 3 Wils. 274; *Whittaker v. Wisbey*, 12 C. B. 52; 21 L. J., C. P. 116; though the record may be the only legal evidence of the proceeding at Nisi Prius recorded in it. Where, to prove that the plaintiff had been discharged under the Insolvent Act, it was proposed to give in evidence his admission to that effect, *Ld. Ellenborough* held it insufficient. *Scott v. Clare*, 3 Camp. 236; but see the cases cited under tit. *Admissions*, post, p. 61. So oral evidence is not admissible to prove the taking of oaths required by the Toleration Act, which must appear by the records of the Court where the oaths were taken. *R. v. Hube*, Peake, 132. Where the deposition of a witness in a case of misdemeanor was taken under 7 Geo. 4, c. 64, s. 3, and the plaintiff in an action against the witness offered oral evidence of an admission made by him in such deposition, the Court held such evidence to have been rightly rejected. *Leach v. Simpson*, 5 M. & W. 309.

The counterpart of a deed is admissible as original or primary evidence against the party executing it, and those claiming under him, though no notice to produce the other part has been given. *Burleigh v. Stibbs*, 5 T. R. 465; *Roe d. West v. Davis*, 7 East, 363; *Houghton v. Kanig*, 18 C. B. 235; 25 L. J., C. P. 218; so a duplicate original may be adduced in evidence without notice to produce the other original. *Colling v. Treweek*, 6 B. & C. 394, 398; and in the case of printed matter each copy of the same impression is an original. *R. v. Watson*, 2 Stark. 129.

Though a written contract must be produced in an action founded on it, yet a mere memorandum, not signed by the parties nor intended to be final, will not prevent the introduction of oral evidence of a contract. *Doe d. Bingham v. Cartwright*, 3 B. & A. 326; and see *Hawkins v. Warre*, 3 B. & C. 698. So where an oral contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but is not signed by the vendee, the contract may be proved by oral evidence. *Dalison v. Stark*, 4 Esp. 162. A vendee may give evidence of warranty, although a note of the sale and receipt of the money, given by the vendor to the vendee after the conclusion of an oral contract, contained no notice of any warranty. *Allen v. Pink*, 4 M. & W. 140. So of the memorandum of the terms of a lease, not signed by the lessor, but only by the wife of the lessee. *R. v. S. Martin's, Leicester*, 2 Ad. & E. 210. See also *R. v. Wrangle*, Id. 514. The case of *Whitford v. Tutin*, 10 Bing. 395, may seem hardly distinguishable in principle from some of the above. There it was held that a secretary, who accepted an engagement under a society on the terms contained in a resolution entered in the society's book, was held bound to produce the book in an action for his salary, though not a party to the resolution. The distinction seems to be, that the hiring was expressly upon the written terms, though the writing was not in itself a contract. The general proposition established by the cases seems to be that a mere unaccepted proposal, executory memorandum, private minute or unauthorised entry of one of the parties, will not exclude oral proof. But where an oral contract expressly incorporates, or refers to, a written paper as

part of its terms, that paper ought to be produced in order to prove those terms. See *Hill v. Nuttall*, 17 C. B., N. S. 262; 33 L. J., C. P. 303.

In order to render the production of a writing necessary, it must appear to relate to the matter in question. Thus where oral evidence is offered to prove a tenancy, it is not a valid objection that there is *some* written agreement relative to the holding, unless it also appears that the agreement was between the parties as landlord and tenant, and that it continues in force at the very time to which the oral evidence applies. *Doe d. Wood v. Morris*, 12 East, 237; *Stevens v. Pinney*, 2 B. Moore, 349. Oral evidence of the terms of a demise is admissible, although the witness called to prove them states that the lessor read them from some paper held in his hand at the time, but which was not shown to, or signed by the lessee. *Trewhitt v. Lambert*, 10 Ad. & E. 470.

If, in an action for work and labour, it appears that the claim is for extras on a written contract, the written contract must be produced. *Vincent v. Cole*, M. & M. 257; *Buxton v. Cornish*, 12 M. & W. 426. But if an entirely separate order be given for the extras, then production of the written contract is not necessary. *Reid v. Batte*, M. & M. 413.

If oral evidence of an agreement is given at a trial, the party desirous of excluding it may at once interpose and ask the witness whether it was not in writing; if the witness deny this, he may then give evidence on a collateral issue to show that the agreement was in writing; *Cox v. Couvess*, 2 F. & F. 139; or he may reserve the question for cross-examination, and may inquire as to the contents of the writing, so far as may be necessary, to show that oral evidence is inadmissible. *Curtis v. Created*, 1 Ad. & E. 167. It is not enough to prove, by a witness, that the solicitor of the opposite party has admitted in conversation that there was a written agreement on the subject; for a solicitor is not an agent of his client to make such admissions. *Watson v. King*, 3 C. B. 608.

Whether the existence of a writing is sufficiently proved to exclude oral evidence is a question for the judge.

SECONDARY EVIDENCE.

Secondary evidence is admitted in cases where the principle which excludes it, namely, the supposed existence of better evidence behind, which it is in the power of the party to produce, does not apply. Thus, it is admissible if a ground be laid for it by proving that better evidence cannot be obtained. *Rainy v. Bravo*, L. R., 4 P. C. 287. In the case of a lost deed, the loss or destruction must be proved; and if it appears that two or more parts have been executed, the loss of all the parts should, it is said, be proved, otherwise "perhaps" a copy will not be admitted. B. N. P. 254; and see *R. v. Castleton*, 6 T. R. 236; and *Munn v. Godbold*, 3 Bing. 292, 294, *per* Best, C. J. So where an instrument is in the possession of the opposite party, oral evidence of its contents may be given, on proof of the service of a notice to produce it. All the proper sources from which the primary evidence can be procured must be exhausted before secondary evidence can be admitted. Thus, the party who has the legal custody of an instrument must be applied to. *R. v. Stots Golding*, 1 B. & A. 173. So where a letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court, it was ruled that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the court. *Williams v. Munnings*, Ry. & M. 18. The construction of a lost document, though proved by oral evidence, is for the judge, where the veracity of the witness

as to its contents is not questioned. *Berwick v. Horsfall*, 4 C. B., N. S. 450 ; 27 L. J., C. P. 193.

The *wrongful* refusal of a third party to produce a document in his possession on *subpœna duces*, will not let in oral evidence of it. *Jesus College v. Gibbs*, 1 Y. & C. 156 ; *R. v. Llanfaethly*, 2 E. & B. 940 ; 23 L. J., M. C. 33. But where a document is in the hands of a party, as a solicitor, who is called to produce it, but declines to do so, relying upon his privilege or upon his lien, secondary evidence of its contents may be given. *Marston v. Downes*, 1 Ad. & E. 31 ; *R. v. Leatham*, 8 Cox C. C. 498 ; 30 L. J., Q. B. 205, *per* Hill, J. ; *Doe d. Gilbert v. Ross*, 7 M. & W. 102. In the last case, it was suggested by the court that, where the solicitor refuses on the ground of privilege, it may perhaps be necessary to show that his client also objects to the production. It has, however, been ruled that where the solicitor has it in court, but states that he is instructed by his client (a third person) to refuse it, it is unnecessary to go further and prove, by the client in person, that he objects. *Phelps v. Prew*, 3 E. & B. 430 ; 23 L. J., Q. B. 140. See also *Newton v. Chaplin*, 10 C. B. 356 ; 19 L. J., C. P. 374. The secondary evidence cannot be received unless the solicitor has been duly served with a *subpœna duces* ; *Hibberd v. Knight*, 2 Exch. 11 ; or has the document in court, and refuses on demand to produce it. *Semb. Dwyer v. Collins*, 7 Exch. 639 ; 21 L. J., Ex. 225, cited *post*, p. 9. In *Boyle v. Wiseman*, 10 Exch. 647 ; 24 L. J., Ex. 160, it was considered by the judges that where a private letter was in the hands of a person resident abroad, and out of the jurisdiction of the English courts, who refused to part with it or produce it on the trial of a cause, the contents might be proved by secondary evidence, if all reasonable exertions have been made to produce the original. In such a case, the person requiring the production should disclose to the proprietor of the instrument the object of the application. See *Brown v. Thornton*, 6 Ad. & E. 185 ; *Quilter v. Torss*, 14 C. B., N. S. 747.

The contents of documents of a public nature, required by law to be kept, may be proved by examined (and in some cases by office or certified) copies without accounting for the non-production of the original document ; *vide Proof of documents by copies, post*, pp. 91 *et seq.* ; and the same rule applies to public registers and documents kept abroad ; *vide post*, p. 92. But in the case of a private document filed in a foreign court, it is necessary to prove that an unsuccessful application has been made to the legal custodian thereof, *viz.*, to the court, before secondary evidence is admissible ; an application to an inferior officer of the court, though he have the actual custody of it, is not enough. *Crispin v. Doghioni*, 32 L. J., P. M. & A. 109.

In some cases secondary evidence of *oral testimony* is admitted ; as where the testimony of a witness on a former trial is admitted on another trial without producing him in person. The circumstances under which this may be done will be found *post*, p. 109. So, where the evidence of a witness is taken out of court by affidavit or deposition, by proper authority ; *vide Proof by affidavits or depositions, post*, p. 174.

Proof of loss of document.] Where secondary evidence is offered in consequence of the loss of the primary evidence, it must be shown to the satisfaction of the judge that diligent search has been made in those quarters in which the primary evidence was likely to be procured. Where the publisher of a paper, in which a libel had appeared, stated that he believed the original was either destroyed or lost, having been thrown aside as useless, this was held sufficient to let in secondary evidence. *R. v. Johnson*, 7 East, 66. So where a licence to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his custom

to destroy or put aside such licences as waste paper, and that he had disposed of the licence in question in the same manner as other licences ; that he had searched for it, but had not found it, the court held the loss sufficiently proved. *Kensington v. Inglis*, 8 East, 278. So where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and, having become useless on account of a second policy being effected, had probably been returned to the plaintiff ; and the clerk of the plaintiff's attorney searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place likely to contain a paper of this description, the search was held to be sufficient. *Brewster v. Sewell*, 3 B. & A. 296. As a general rule, to admit secondary evidence of a deed of apprenticeship, proof should be given that a search has been made for the original instrument among the papers both of the master and apprentice. *R. v. Hinchley*, 3 B. & S. 885 ; 32 L. J., M. C. 158. But in that case it was held that long after the expiration of the term of apprenticeship, the deed was probably in the custody of the apprentice, as he was then most interested in it, and that a search among his papers was sufficient. So in another settlement case, where it was proved that one part only of an indenture had been executed, that the pauper and master were both dead at the time of trial, and that an inquiry for it had been made of the pauper shortly before his death, who said that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it ; and that an inquiry had also been made of the daughter and sole executrix of the master, who said she knew nothing about it, it was held that a sufficient inquiry had been made to render parol evidence of the contents admissible. *R. v. Morton*, 4 M. & S. 48. See *R. v. Piddlehinton*, 3 B. & Ad. 460. But where the only evidence of loss consisted of the declarations of the deceased pauper, who stated that the indenture had been given back to him, and worn out, parol evidence was held inadmissible. *R. v. Rawden*, 2 Ad. & E. 156.

When the party, in whose possession the instrument was, is alive, it has in some cases been held that he ought to be called, and his declarations are not admissible. *R. v. Denio*, 7 B. & C. 620 ; *R. v. Castleton*, 6 T. R. 236. But, generally, the declarations of the persons applied to are received in evidence, to show that due inquiry and search has been made, and the judge determines whether the search is sufficient. *R. v. Kenilworth*, 7 Q. B. 642 ; *R. v. Braintree*, 1 E. & E. 51 ; 28 L. J., M. C. 1. And the inclination of the court in *R. v. Saffron Hill*, 1 E. & B. 93 ; 22 L. J., M. C. 22, seems to have been that it is not in every case necessary to call the person applied to as a witness ; it is a question for the judge, subject to review by the court.

Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction will be required, and a useless paper will be presumed to be destroyed. *R. v. E. Farleigh*, 6 D. & Ry. 153 ; and *per* Abbott, C. J., *Brewster v. Sewell*, 3 B. & A. 296, and cases cited, *supra*. Thus, where depositions had been delivered to the clerk of the peace or his deputy, it appearing to be the practice to throw them away as useless, slight evidence of a search for them was held sufficient, and the deputy need not be called, it being his duty to deliver them to his principal. *Freeman v. Arkell*, 2 B. & C. 496. A constable, who levied under a warrant issued by the defendant, and was entitled to the custody of it, said that he had deposited it in his office, but was unable, upon search, to find it : held that secondary evidence of it was admissible against the defendant, though no notice to produce was served on him. *Fernley v. Worthington*, 1 M. & Gr. 491. The degree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of the case. *Per Cur.* in *Gully v. Bp. of Exeter*, 4 Bing. 298. If not found in

its proper place of deposit, further search may generally be dispensed with ; as where it was the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. Thus a fruitless search in the parish chest for indentures, given up to the parish officers long ago, is sufficient to let in parol evidence of them. *R. v. Stourbridge*, 8 B. & C. 96 ; 2 M. & Ry. 43. See also *R. v. Hinchley*, ante, p. 6.

A cheque drawn on account of a parish was delivered to the defendant, who was then paying clerk of the parish ; it was shown that the bankers of the parish, on the same day, paid the cheque, and that their custom was to return the paid cheques to the paying clerk, who deposited them in an apartment in the workhouse ; the defendant was no longer in office as paying clerk, and his successor was not called ; a witness stated that he had made application to him for an inspection of the cheques, and that he had handed him several bundles, which the witness looked through without finding the cheque in question ; it was held that secondary evidence of the contents of the cheque was admissible. *McGahey v. Alston*, 2 M. & W. 206. In *Pardoe v. Price*, 13 M. & W. 267, a search for a security given to one K. in an attorney's office, where the papers of K. and of his executrix were deposited, was held to be sufficient to let in secondary evidence.

If there are several places of probable deposit, all should be searched. Where a conveyance of freehold and leasehold in trust was alleged to be lost, and one of the trustees and the heir of another, deceased, negatived possession of it, it was held insufficient unless the executor of the deceased trustee was also questioned, who had taken possession of his papers. *Doe d. Richards v. Lewis*, 11 C. B. 1035 ; 20 L. J., C. P. 177. And where there were duplicate instruments executed, a search for both seems necessary, ante, p. 4.

Secondary evidence of a bill or note in a negotiable state cannot be admitted, when the loss is specially pleaded, unless the destruction, and not the mere loss, of it be proved. See post, Part II., *Action on Bills of Exchange ; Production of the Bill*.

Though proof of the destruction of the original lets in secondary proof, yet if the destruction is alleged to have been by, or while in the possession of, the opposite party, a notice to produce is required. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46, cited post, p. 8.

The objection that secondary evidence of a document is offered without proof of due search for the original must be distinctly made at the trial ; otherwise the court will not entertain it on a motion for a new trial. *Williams v. Wilcox*, 8 Ad. & E. 314.

Notice to produce when necessary.] In general, when any written instrument is in the possession or power of the opposite party, secondary evidence of its contents is inadmissible without previous proof of a notice to produce the original. *R. v. Elworthy*, L. R., 1 C. C. 105. But where, from the nature of the proceedings, the party in possession of the instrument necessarily has notice that he is to be charged with the possession of it, as in the case of trover for a bond, a notice to produce is unnecessary. *Hov v. Hall*, 14 East, 274 ; *Scott v. Jones*, 4 Taunt. 865. And the plaintiff may prove the nature and description of the document for which trover is brought by secondary evidence, though the defendant offers to produce it ; for that is part of the defendant's evidence. *Whitehead v. Scott*, 1 M. & Rob. 2. So a notice is not required where the party has procured the possession of the instrument by fraud, after the action commenced, from a witness called for the purpose of producing it under a *subpœna duces tecum*. *Leeds v. Cook*, 4 Esp. 256. A counterpart executed by the defendant may be read by the plaintiff with-

out a notice to produce the original. *Burleigh v. Stibbs*, 5 T. R. 465. See also other cases cited, *ante*, p. 3. In trover against a sheriff for executing a *fi. fa.*, plaintiff may give evidence of the warrant and its loss, without notice to produce it. *Minshall v. Lloyd*, 2 M. & W. 450. In an action for seamen's wages, secondary evidence of the ship's articles is admissible under 17 & 18 Vict. c. 104, s. 164, without any notice to produce them. See *Bowman v. Manzelman*, 2 Camp. 315, decided under an earlier statute. But where defendant pleaded to an action by drawer of a bill, that he accepted in part payment of a debt due from defendant to plaintiff in order to induce him to prove his debt under a fiat then pending against the defendant, to which plaintiff replied by denying acceptance in part payment of such debt: held that plaintiff was not bound to produce the bill without notice to produce; *Goodred v. Armour*, 3 Q. B. 956; and the same point was ruled where the defendant pleaded that his acceptance was obtained by fraud, and issue was joined thereon. *Lawrence v. Clark*, 14 M. & W. 250. In ejectment the defendant relied upon a will; on the cross-examination of one of his witnesses he stated that, about a fortnight after the execution of the will, a second will was prepared, which had come to the possession of the defendant: the plaintiff's counsel was not allowed to ask whether the latter paper was duly signed by three witnesses, and whether the testator had declared it to be his last will, no notice to produce it having been given. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46.

Notice to produce a notice to produce is, for obvious reasons, not necessary; and, generally, a notice to produce any notice on which the action is founded is also unnecessary. It is usual in business to make two copies of them, and to serve one and retain the other; indorsing on the one retained the time and mode of service. There can be no doubt that in this case the notice served is, strictly speaking, the only *primary* evidence. But a custom, and not an unreasonable one, of admitting the copy, which is almost a duplicate original, has obtained. There is some little doubt as to what are the notices to which the rule extends. It clearly extends to a notice to produce documents; it has also been held to extend to a notice to quit; *Doe d. Fleming v. Somerton*, 7 Q. B. 58; to a notice of dishonour; *Swain v. Lewis*, 2 C. M. & R. 261; *Kine v. Beaumont*, 3 B. & B. 288; and to a notice of demand of a copy of the warrant pursuant to the 24 Geo. 2, c. 44, s. 6; *Jory v. Orchard*, 2 B. & P. 39. But the rule does not extend to notice of dishonour of bills other than the bill sued on. *Lanauze v. Palmer*, M. & M. 31.

In order to prove the delivery of a solicitor's signed bill of costs, it is not necessary to give notice to produce the bill delivered, which is itself a notice. *Colling v. Treweek*, 6 B. & C. 394. See also the 6 & 7 Vict. c. 73, s. 37.

By Rules, 1883, O. xxxii., r. 8, "an affidavit of the solicitor or his clerk of the service of any notice to produce and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served." It would seem that "sufficient evidence" means in this rule *prima facie* evidence only; see *Barraclough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch., *post*, p. 141. This rule dispenses with the notice to admit which was required under the C. L. P. Act, 1852, s. 119, now repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49.

It has been held that a party is not to be allowed, either in an examination in chief or in cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession in court at the time of the trial, not having received a notice to produce. *Roe d. Haldane v. Harvey*, 4 Burr. 2484; *Bate v. Kinsey*, 1 C. M. & R. 38. But

this doctrine has been denied, and the cases on which it is founded, distinguished in *Dwyer v. Collins*, 7 Exch. 639; 21 L. J., Ex. 225, where it was held that if a party has the document in court at the trial, a requisition to produce it, given at the trial, will be sufficient to let in secondary evidence to it, if production is refused; and the solicitor of one party may be asked in court whether he has the document in court, and is bound to answer the question, though he may be justified in refusing to produce it on the ground of confidence. For the object of a notice is only to give the party an opportunity to produce it, if he pleases.

Although the contents of a document may be proved by an admission of the opposite party out of court, yet it seems that the party cannot himself be cross-examined (when produced as a witness) respecting its contents unless he has had notice to produce it. *Darby v. Ouseley*, 25 L. J., Ex. 227. In this last case it did not appear that the party interrogated had the document in his power or possession, and the language of the court almost goes to the extent of showing that a party cannot be called on to say whether he admits the contents of any document, though his admission out of court would have been evidence according to *Slatterie v. Pooley*, ante, p. 2. The court considered that there was a difference between proving an admission and calling upon the party in court to make one. See also *Whyman v. Garth*, 8 Exch. 803; 22 L. J., Ex. 316, cited post, p. 124.

An admission in the usual form, under a notice to admit, as now required, of the accuracy of a copy, will not dispense with a notice to produce the original, if in the opposite party's possession, or with other pre-requisites for the reception of secondary evidence. See *Sharpe v. Lamb*, 11 Ad. & E. 805; *Admission under notice to admit*, post, pp. 70, et seq.

Notice to produce; proof of possession of original.] In order to render a notice to produce available, it must be proved that the original instrument is in the hands of the opposite party, or of some person in privity with him. The nature of this evidence must vary according to the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that looking at his entry of charges he had no doubt the certificate was allowed, this was held to be presumptive proof of the certificate having come to the defendant's hands. *Henry v. Leigh*, 3 Camp. 502. Where the instrument has been delivered to a third person, between whom and the party to the suit there exists a privity, notice to the latter is sufficient; as in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been delivered to the master by the defendant, is sufficient. *Baldney v. Ritchie*, 1 Stark. 338. So in an action against the sheriff, a notice to his solicitor to produce a warrant, which has been returned to the undersheriff while the defendant was in office, is sufficient, whether the defendant be in or out of office at the time of notice. *Taplin v. Atty*, 3 Bing. 164; *Suter v. Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193. So also notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the cheque remains in the banker's hands. *Partridge v. Coates*, Ry. & M. 156. So notice to a party to the action to produce a document in the possession of his solicitor in another action is sufficient. *Irwin v. Lever*, 2 F. & F. 296. If the instrument was in possession of the party at the time of the service of notice he cannot afterwards voluntarily part with it so as to get rid of the effect of the notice. *Dallas, C. J.*, in *Knight v. Martin*, Gow, 104; and *Best, C. J.*, in *Sinclair v. Stevenson*, 1 C. & P. 585. But

where the plaintiff was nonsuited in a cause in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and on a second trial plaintiff again gave defendant's attorney notice to produce it, and was then told by him of the assignment, it was held that secondary evidence was inadmissible and a *subpoena* necessary. *Knight v. Martin*, Gow, 103. Where a paper had been delivered to a third person under whom the defendant justified in an action of trespass, and by whose directions he acted, a notice to produce, served upon the defendant, was held not sufficient to authorise the admission of secondary evidence. *Evans v. Sweet*, Ry. & M. 83. It is said, however, in B. N. P. 254, that "if it were proved that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought to be read, even though the defendant have sworn in an answer in Chancery that he has not got the original." For this the learned author refers to *Thurston v. Delahay*, Hereford Ass. 1744; *Pritchard v. Symonds*, Hereford, 1744; *Bartlett v. Gawler*, 14 Geo. 2, K. B. But the statement is rather loose. When a document is in the hands of a person who holds it as stakeholder between the defendant and a third party, the notice to produce is not sufficient to let in secondary evidence; *Parry v. May*, 1 M. & Rob. 279; for though it need not be shown that the document is in the actual possession of the party, it must be in the hands of some one who is bound to give up possession to him. S. C. See also *Wright v. Bunyard*, 2 F. & F. 193.

The question whether there is sufficient proof of possession in the opposite party is in general solely for the judge; and, where the notice to produce is given by the plaintiff, the defendant may interpose with evidence to disprove possession; and such evidence (being, in fact, for the information of the judge) gives the plaintiff no reply to the jury. *Harvey v. Mitchell*, 2 M. & Rob. 366. Notice to produce a book containing the terms of an agreement was served on defendant; at the trial defendant produced such a book, but plaintiff denied that it was the right one, though defendant denied possession of any other; the question of the existence of another was held to be for the judge, but he might, by consent, take the opinion of the jury on it as an interlocutory issue. *Froude v. Hobbs*, 1 F. & F. 612. "Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury." *Stowe v. Querner*, L. R., 5 Ex. 155, 158, 159, *per* Bramwell, B. This was an action on a policy of insurance, in which the existence of the policy was in issue; the defendant did not produce the policy at the trial pursuant to notice, and thereupon the plaintiff put in a copy received from defendant's broker; the defendant objected, and offered evidence to show that there never was an original policy, but the judge admitted the copy. The evidence was subsequently given, and the judge left it to the jury to say whether the defendant had executed a stamped policy. The jury found in the affirmative. It was held that the question was rightly left to them, inasmuch as if the judge had himself decided it he would have decided the main issue between the parties.

Notice to produce; form of.] The rule formerly was that a notice to produce might be oral, and if both a written and oral notice have been given, proof of either was sufficient. *Smith v. Young*, 1 Camp. 440. Rules, 1883, O. xxxii., r. 8, specifies the form of a notice to produce, and O. lxvi., r. 1,

provides that "all notices required by these rules shall be in writing, unless expressly authorised by the court or a judge to be given orally." It is not easy to say precisely to what extent the notice to produce a document ought to define it. Several documents are generally required, and the practice is to include them all in one notice. It is also usual to give some particular description of the documents required, but it is better to give a general description than to risk giving an erroneous one. A notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action" (*Jacob v. Lee*, 2 M. & Rob. 33; *Patteson, J.*), or "all letters written to, and received by, plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, &c., relating to the subject-matter of this cause," (*Morris v. Hauser, Id.* 392, *Ld. Denman, C. J.*) has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. So in *Rogers v. Custance, Id.* 179, *Ld. Denman, C. J.*, held a notice to produce "all accounts, papers and writings in any way relating to the matters in question in this case" sufficiently to particularise a written account of the work done by the plaintiff, delivered to the defendant, and admitted by him to be correct; affirmed by *Q. B. Id.* 181. And in the recent case of *Conybeare v. Farries, L. R.*, 5 Ex. 16, a notice to produce "all letters relating to your tenancy of a room, &c.," was held sufficient to include a letter which, with the plaintiff's reply, constituted the tenancy. The notice must not, however, be too general, as "all letters." *Gardner v. Wright*, 15 L. T., N. S. 325, *Blackburn, J.* See also *Jones v. Edwards, M'Cl. & Y.* 139. In *France v. Lucy, Ry. & M.* 341, it was held by *Best, C. J.*, that a notice to produce "all letters, papers and documents touching or concerning the bill of exchange mentioned in the declaration, and the bill sought to be recovered," did not sufficiently describe a notice of dishonour sent by the plaintiff to the defendant. But this decision is hardly consistent with the more recent cases cited above. If the title of the cause is misdescribed in the notice, it has been held bad; *Harvey v. Morgan*, 2 Stark. 19; but *semb.* no title at all was necessary, and there were other grounds of decision in this case: nor was there in that case any ground for supposing that the misdescription could mislead. In a later case, where the notice entitled in a wrong court, it was considered sufficient. *Lawrence v. Clark*, 14 M. & W. 250. Notice to produce a letter purporting to enclose an account is sufficient notice to produce the account. *Engall v. Druce*, 9 W. R. 536, *E. T.* 1861, *C. P.*

Notice to produce; service of, on whom.] In general it is sufficient to serve the notice to produce on the solicitor or agent of the party. *Cates v. Winter*, 3 T. R. 306. Indeed, it seems more proper to do so where there is a solicitor. *Houseman v. Roberts*, 5 C. & P. 394. But notice served on the party is sufficient. *Hughes v. Budd*, 8 Dowl. 315. A notice to produce papers not necessarily connected with the cause, served on the solicitor so late as to prevent the party (*i.e.*, his client) from receiving it in time before the trial, is not good. *Vice v. Anson, Ly., M. & M.* 96. Where the solicitor has been changed, a notice to produce served on the first solicitor before the change will entitle the party to call for production of the paper. *Doe d. Martin v. Martin*, 1 M. & Rob. 242. It is sufficient to leave the notice with the servant of the party at his dwelling-house. *Evans v. Sweet, Ry. & M.* 83, 84, *per Best, C. J.*

Notice to produce; time and place of service.] The proper time and place of service of a notice to produce will depend on the circumstances of the case. The notice must be such as to satisfy the judge that the party called upon to produce the document might, by using reasonable diligence, have done so.

Service of the notice upon the wife of the defendant's attorney in a town cause late in the evening before the trial was held insufficient. *Doe d. Wartney v. Grey*, 1 Stark. 283. So service in the attorney's office letter-box late over night. *Lawrence v. Clark*, 14 M. & W. 250. But notice to produce a letter, served on the attorney of the party on the evening next but one before the trial, was ruled to be sufficient, though the party was out of England; the presumption being that, on going abroad, the party had left with his attorney the papers necessary for the conduct of the trial. *Bryan v. Wagstaff*, Ry. & M. 327. See also *Aflalo v. Fourdrinier*, M. & M. 335, n. A notice served on the 10th of April, the trial being on the 14th, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad. *Drabble v. Donner*, Ry. & M. 47. A notice to produce certain deeds was served on an attorney in Essex on Saturday, Monday being the commission day: he fetched them from London; on Monday evening notice was given to produce another deed; the attorney said it was in London, but should be fetched if the party would pay the expense of the journey; no offer to pay was made, and the trial came on on Thursday: the second notice was held insufficient. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182. Notice served on the attorney at his office on the evening before the trial, at 7 h. 30 m. P.M., was held insufficient to let in secondary evidence of a letter in his client's possession. *Byrne v. Harvey*, 2 M. & Rob. 89. And now, by Rules, 1883, O. lxiv. r. 11, service of notices shall be made before 6 P.M., on every day but Saturday, when it must be before 2 P.M., otherwise it will be deemed service on the next following day, or on Monday, respectively. This rule includes notices to produce, at least when served on solicitors. *Sed quære*, if they apply to such notices as the above given at assizes or sittings at Nisi Prius! In a town case, both party and attorney living there, service at 7 P.M., over-night, was held sufficient by Alderson, B. *Leap v. Butt*, Car. & M. 451; *Meyrick v. Woods*, Id. 452.

Notice to produce must in general be served before the commission day, when parties are living away from the assize town; *Trist v. Johnson*, 1 M. & Rob. 259; accord. *R. v. Ellicombe*, Id. 260; but there seems to be no inflexible rule as to time; for where both attorney and client lived in the assize town, a notice served two days before trial, though after the commission day, has been held sufficient; *Firkin v. Edwards*, 9 C. & P. 478; and where a paper might be expected to be in the solicitor's hands, a notice on him at his office a day before the trial of a town cause may be good. *Gibbons v. Powell*, Id. 634. A three days' notice was held sufficient in the case of letters written by defendant to a person in New South Wales, where long litigation on the subject of them made it presumable that they had been remitted to him in this country. *Sturge v. Buchanan*, 10 Ad. & E. 598. But in one case a notice served on a defendant shortly before the assizes to produce a letter written to his firm at Bombay, where their only place of business was, was held insufficient. *Ehrensperger v. Anderson*, 3 Exch. 148. Service of a notice on Sunday is probably bad; or, at all events, will only operate as service on the next day. *Hughes v. Budd*, 8 Dowl. 315, 317. The notice may be served even after the trial has commenced, if there be time to produce before the adjournment day. *Sturm v. Jeffree*, 2 Car. & K. 442.

All the cases prior to *Dwyer v. Collins*, 7 Exch. 639; 21 L. J., Ex. 225, *ante*, p. 9, ought now to be considered with reference to that case. It had formerly been sometimes thought that the object of a notice to produce a document was to inform the opposite party of the intention to use it, but this notion was entirely repudiated in that case after full consideration. And it was there held that the object of the notice to produce was merely to

give the party holding the document an opportunity to produce it, if he wished, and, in default of his doing so, to enable the party giving the notice to give secondary evidence of its contents. And on this ground the court held that the attorney of one of the parties present in court, and having the document with him, could be called upon, then and there, to produce it, and if he did not do so, that secondary evidence was admissible.

After a new trial is ordered it is not necessary to serve fresh notices to produce, those served on the former trial being available. *Hope v. Beadon*, 17 Q. B. 209; 21 L. J. Q. B. 25.

Notice to produce; effect of.] If the party refuse to produce the papers required, such a circumstance is not of itself evidence against him; it merely entitles the other party to give secondary evidence. *Cooper v. Gibbons*, 3 Camp. 363; *Lawson v. Sherwood*, 1 Stark. 315. The refusal to produce them is, however, matter for observation to the jury. *Semb. Ld. Lyndhurst, C.B., Bate v. Kinsey*, 1 C. M. & R. 41. But see *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571. If the party giving the notice decline to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer v. Kitchen*, 1 Esp. 210; though it is otherwise if the papers are used or inspected by the party calling for them. *Wilson v. Bowie*, 1 C. & P. 10; and see *Wharam v. Routledge*, 5 Esp. 235. Notice to produce papers will not entitle the party who gives it to cross-examine a witness as to their contents; *Graham v. Dyster*, 2 Stark. 23; except after refusal to produce. If the party refuse, he cannot afterwards use the original either to contradict the secondary proof; *Doe d. Thomson v. Hodgson*, 12 Ad. & E. 135; or to show that there are attesting witnesses who ought to be called; *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 413; or to refresh the memory of a witness; *Till v. Ainsworth*, Bristol, 1874, Wilde, C. J., *MS.*; or it seems for any purpose, *Collins v. Garbon*, 2 F. & F. 47, Byles, J. He is, in effect, bound by any legal and *satisfactory* evidence produced on the other side.

This principle has been extended by Rules, 1883, O. xxxi., r. 15, which provides that, "Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice; in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit." RR. 16-18, regulate the procedure under this rule. See hereon *Quilter v. Heatley*, 23 Ch. D. 42, C. A., explaining *Webster v. Whewall*, 15 Ch. D. 120.

General nature of secondary evidence.] There are no degrees of secondary evidence; or, in other words, if the production of the original document is dispensed with, its contents may be proved by the same evidence as any other fact is capable of being proved, and no other restriction is laid upon the party producing the evidence, as to the kind of evidence which he shall produce for this purpose, except that which arises from the risk of having it treated as unsatisfactory by the jury. This is what a jury would very probably do, and might possibly by a judge be

advised to do, if it was patent that more satisfactory evidence was available to the party than that which he had thought fit to produce. *Doe d. Gilbert v. Ross*, 7 M. & W. 402.

The only exception is where, as in the case of public documents hereafter to be noticed, a special kind of secondary evidence is substituted for the original. But even in this case, if good reason can be shown why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. 1 Taylor, Evid., § 496; *Thurston v. Slatford*, 1 Salk. 284; *MacDougal v. Young*, Ry. & M. 392; *Anon.*, 1 Vent. 257.

Proof of documents by copies.] It is a general custom, especially of persons in business, to keep copies of all the more important documents relating to the matters in which they are engaged. And there is no doubt that a well-authenticated copy is by far the most satisfactory substitute for the original document.

But, of course, no copy whatever is admissible in evidence unless its accuracy be sworn to, or there be some presumption attached to it from which its accuracy may be inferred. *Fisher v. Samuda*, 1 Camp. 190. It is not necessary to call the very person who wrote the copy; any person who can testify on oath to the accuracy of it is sufficient. *Everingham v. Roundell*, 2 M. & Rob. 138.

A copy of a letter taken by a copying machine, though still only a copy, will be presumed to be a correct copy. *Nodin v. Murray*, 3 Camp. 228; *Simpson v. Thoreton*, 2 M. & Rob. 433. And such copy may be used as an admission. *Nathan v. Jacob*, 1 F. & F. 452. As to the use of an unstamped copy or part as secondary evidence of an original or part, see *post*, *Stamps*.—*Copy and Duplicate*. Where the plaintiff gave the defendant notice to produce certain letters written by the defendant to a third party, and a letter book containing copies thereof, and the defendant consented to admit the copies and produce the book: held, that the copies when produced must be presumed to be correct. *Sturge v. Buchanan*, 10 Ad. & E. 598. An entry by the plaintiff's deceased clerk in a letter book, purporting to be a copy of a letter from the plaintiff to the defendant, is presumed to be correct, proof being given that, according to the course of business, letters of business written by the plaintiff were copied by this clerk. *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, *Id.* 377. See further *Hearsay*,—*Entries in course of business*, *post*, p. 57.

Among instances in which copies, though not verified by oath, are admissible, are the following:—A very old instrument, purporting to be a copy or abstract of a conveyance, and which for many years had gone along with the possession of the land, was admitted in evidence without proving it to be a true copy. *B. N. P.* 254. A copy of an old decree in chancery, establishing certain customs as against the lord of the manor, found among the muniments of his successor, was held to be admissible, and presumed to be correct, against the successor, on account of its place of deposit. *Price v. Woodhouse*, 3 Exch. 616.

An old ledger or cartulary of an abbey, containing amongst other things an account of the several endowments, and found in the possession of the person who had succeeded to part of the abbey estates, was admitted as secondary evidence of the endowment, search having been made for the original endowment. *Bullen v. Michel*, 2 Price, 399; 4 Dow, 297. So also in *Williams v. Wilcox*, 8 Ad. & E. 314, a copy of a grant in an old cartulary seems to have been held admissible as secondary evidence. It is not clear whether the admission of old monastic cartularies stands on the same footing as that of Episcopal Registers mentioned *post* (sub tit. *Effect of Documentary*

Evidence—Bishop's Registers), or of old copies and abstracts already referred to. In either case the antiquity of the document, and the inevitable exposure to destruction and loss of very old originals, give them a title to reception, which recent unexamined copies cannot claim; and the known usage of preserving verbatim enrolments and registers of the title-deeds of religious houses imparts to such collections, in some sort, an official character. Such copies, however, have never been admitted unless traced to the custody of some grantee of the corporate lands, and tendered as evidence in support of ancient possession, or preserved among the crown records as muniments of its title. If they come from custody unconnected with the lands, and even from a public national library, they are inadmissible. *Swinnerton v. Stafford*, *Ms. of*, 3 Taunt. 91; *Potts v. Durant*, 3 Anst. 789. See further *Doe d. Padwick v. Witcomb*, 6 Exch. 601; 20 L. J., Ex. 297; 4 H. L. C. 425; and *Proof of Documents—Custody of Ancient Writings*, *post*, p. 97.

Where a will is lost the register or ledger book of the Ecclesiastical Court, or a copy of it, has been admitted as secondary evidence of a will of lands. *B. N. P.* 246. It is presumed that in this last case the will was of personal as well as real estate. See further, *Proof of Probate*, *post*. Where the assignment under a commission of bankrupt was lost before it was enrolled pursuant to the old Act, 6 Geo. 4, c. 16, s. 96, the counterpart of it was admitted as secondary evidence. *Giles v. Smith*, 1 C. M. & R. 462.

As to the admissibility of secondary evidence where the original document has been attested, *vide post*, *Proof of documents—Proof of attested deed by secondary evidence*.

In numerous instances copies of public books and registers are good evidence of documents which are in existence without imposing any obligation to produce, or even to account for the non-production of, the originals. This sort of evidence is no doubt secondary in its nature, but is allowed by common law or statute on the ground of public convenience; *vide*, *Proof of documents*, *post*, p. 91.

ORAL EVIDENCE TO EXPLAIN OR ADD TO DOCUMENTS.

The rule of law is clear that, where a contract is reduced into writing, it is presumed that the writing contains all the terms of it, and evidence will not be admitted of any previous or contemporaneous oral agreement which would have the effect of adding to or varying it in any way. This is a rule of evidence at common law. The Statute of Frauds also requires that certain contracts should be in writing, and therefore, by implication, evidence relating to such contracts which is not in writing is not excluded. In other cases it is the duty of certain officers to record, in a manner more or less solemn, what is said or done; as in the case of records of courts of law, or depositions taken before magistrates on a criminal charge. How far such authentic memorials are conclusive is not very well settled, but they are certainly so in some cases. It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and, where several objections might be good, it is not always easy to see which of the two in a particular case forms the *ratio decidendi*. The cases which we are about to consider are those where the decisions have been founded, or seem likely to have been founded, on the common law rule now under consideration.

Another remark which appears to be useful is this: that although the principles upon which the admissibility of evidence in these cases depends would appear to be general as regards all written instruments, they have not been applied in a precisely similar manner to all classes of cases. But perhaps this may be partly explained in the following manner. Inasmuch as the question is whether the written memorandum by its terms excludes

oral evidence, the admissibility of the latter is in all cases, to a certain extent, and in some exclusively so, a question of *interpretation* of the written document. And inasmuch as, in analogy to the use of technical terms, language, by being constantly used for the same purpose, almost always acquires conventional meaning, such (corresponding) groups of cases as have been mentioned naturally arise. In fact, there are two questions of interpretation to be solved, whenever oral evidence is objected to on the ground that it contradicts a written instrument. First, the interpretation of the written contract as it stands; secondly, the interpretation of the clause which it is proposed to insert by way of addition or explanation, for that is really what is done; and this explains how it is that the same question as that which is raised upon the admissibility of evidence was formerly sometimes raised upon demurrer.

Under a system of law, like our own, in which there are scarcely any canons of interpretation, and in a country where contracts, especially mercantile contracts, are very loosely drawn, a decision as to the meaning of one contract is rarely an authority as to the meaning of another.

Bearing these remarks in mind, it will be found that the apparent conflict between many of the cases may be reconciled. A good example of the truth of this remark will be found in the cases of *Field v. Lelean*, and *Spartaki v. Benecke*, *post*, pp. 23, 24.

The following decisions will illustrate what is said above. Thus where it was agreed in writing that A., for certain considerations, should have the produce of Boreham meadow, it was held that he could not prove that it was at the same time agreed orally that he should have both Milcroft and Boreham meadow. *Meres v. Ansell*, 3 Wils. 275; *Angell v. Duke*, 32 L. T., N. S. 320, E. T. 1875, Q. B.; and see *Hope v. Atkins*, 1 Price, 143. So oral evidence is inadmissible to show that a note, made payable on a day certain, was to be payable on a contingency only. *Rawson v. Walker*, 1 Stark. 361; *Foster v. Jolly*, 1 C. M. & R. 703. So where a promissory note is expressed to be made payable on demand, oral evidence of a contemporary agreement, that it should not be paid until a given event happened, is inadmissible. *Moseley v. Hanford*, 10 B. & C. 729, see also *Besant v. Cross*, 10 C. B. 895; 20 L. J., C. P. 173; *Adams v. Wordley*, 1 M. & W. 374. But defendant may show that the agreement, though not under seal, was in the nature of an escrow, and signed on the express condition that a third party approved. *Pym v. Campbell*, 6 E. & B. 370; 25 L. J., Q. B. 277; *Davis v. Jones*, 17 C. B. 625; 25 L. J., C. P. 91; *Wallis v. Littell*, 11 C. B., N. S. 364; 31 L. J., C. P. 100; *Rogers v. Hadley*, 32 L. J., Ex. 241; *Lindley v. Lacey*, 17 C. B., N. S. 578; 34 L. J., C. P. 7, cited *post*, p. 18. Where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, in an action for the purchase-money, that oral evidence could not be given by the defendant that the auctioneer had, at the sale, warranted the timber of a certain weight. *Powell v. Edmunds*, 12 East, 6; *Shelton v. Livius*, 2 C. & J. 411. So oral evidence is inadmissible to alter the legal effect and construction of a written agreement. Thus, where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held that oral evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin*, 3 Camp. 426; *Halliley v. Nicholson*, 1 Price, 404. So where a contract of sale, being silent as to time of payment, implies payment on delivery, proof of intended credit is inadmissible. *Ford v. Yates*, 2 M. & Gr. 549. Where the defendant, the day after a sale by him of flour to the plaintiff, sent a memorandum of the sale, "Sold White's X. S.;" and delivered "White's X. S." accordingly: it was held, that the plaintiff could not show that the contract was for "White's X. X. S." *Hamor*

v. Groves, 15 C. B. 667 ; 24 L. J., C. P. 53. It is observable, however, that the four last cases were for non-performance of executory contracts within the Statute of Frauds, which ought to contain *all* the terms of agreement. So where the written agreement was to take goods on board a ship "forthwith," oral evidence to show that they were to be received on board *in two days* was not allowed. *Simpson v. Henderson*, M. & M. 300. An absolute sale of a reversion was held not to be qualified by proof of an oral agreement to apportion the accruing rent. *Flinn v. Callow*, 1 M. & Gr. 589.

But in order to exclude oral proof of a contract, the writing must purport to be a *complete contract*. Therefore where a written order for goods was sent without mentioning a time of payment, and they were delivered with an invoice accordingly, it was ruled in an action for goods sold, that an oral agreement for six months' credit might be proved ; for the order *per se* was no contract, but only evidence of some of the terms of one. *Lockett v. Nicklin*, 2 Exch. 93. So where a written proposal was not accepted, oral evidence of the terms of the contract is admissible. *Scoones v. Dingles*, 29 L. J., Ex. 122. See also *Eden v. Blake*, 13 M. & W. 614, *post*, p. 28. And it would seem that when a writing is not *ex necessitate legis* (as under the Statute of Frauds), the *apparent deficiencies* of a written agreement as to some particulars of price, time of delivery, &c., may be supplied by oral evidence, although the jury would be directed to presume a reasonable price, or reasonable time, &c., in the absence of such evidence ; for such evidence does not *contradict* or *vary* the written document as far as it goes ; and it may be that the parties themselves did not intend to commit to paper the *whole* of the contract. See *Valpy v. Gibson*, 4 C. B. 837. Where the Statute of Frauds applies, oral evidence to supply the intention of the parties would not be admissible, as we have seen above. See further the title *Action for not accepting Goods*, *post*.

If a party sign an agreement in his own name he cannot afterwards defeat an action on it by proving that he signed only as agent for another. *Magee v. Atkinson*, 2 M. & W. 440 ; *Jones v. Littledale*, 6 Ad. & E. 486 ; *Higgins v. Senior*, 8 M. & W. 834. Where A. signed a charter-party as ship-owner, and was so designated in it, A.'s principal could not sue on it, and prove that he was owner, and not A. *Humble v. Hunter*, 12 Q. B. 310. But if a sold note be in the form "sold to our principals," oral evidence is admissible to show who those principals are. *Cropper v. Cook*, L. R., 3 C. P. 194. Where an instrument professed to be made between plaintiff and A., and signed by B. as agent for A., it was held that B. was not liable on the contract, if it turned out that he had no authority to bind A. *Jenkins v. Hutchinson*, 13 Q. B. 744. In an action on a written contract between plaintiff and B., oral evidence is admissible, in behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B. as agent of the defendant ; for the evidence tends not to discharge B., but to charge the dormant principal ; *Wilson v. Hart*, 7 Taunt. 295 ; and it is admissible although B. named his principal at the time he entered into the contract ; *Calder v. Dobell*, L. R., 6 C. P. 486, Ex. Ch. Where a deed between A. and Y., which contained a clause, "it is further understood between the parties that S. guarantees payment to Y. of all moneys due to them under this contract," was executed by S. on behalf of A. under a power of attorney, thus "P. P. A.—A.—S.," oral evidence was held admissible to show that S. signed on behalf of himself as well as for A., as this was doubtful on the face of the agreement. *Young v. Schuler*, 11 Q. B. D. 651, C. A. And see further 2 Smith's L. Cases, *Thompson v. Davenport*, *in notis* ; and *Variance*, *post*, pp. 87, 88.

Where a mortgage deed provided for the payment of the mortgage debt by instalments, and gave a power of sale if the mortgagor *should make*

default in payment of the instalments, it was held that oral evidence was admissible to show that no default had been made, although the instalments had not been paid according to the deed. *Albert v. Grosvenor Investment Co.*, L. R., 3 Q. B. 123. This decision was, however, disapproved in *Williams v. Stern*, 5 Q. B. D. 409, C. A.

A patent ambiguity is to be explained by the judge, and not left to the jury. Thus, whether a "month" means a lunar or calendar month, is a question for the judge; but extrinsic evidence is admissible that a word is used in a sense peculiar to some trade, business, place, or local usage, in which case it is for the jury to find the meaning. *Simpson v. Margitson*, 11 Q. B. 23; *Smith v. Thompson*, 8 C. B. 44. See *Hills v. London Gas Co.*, 27 L. J., Ex. 60, where it seems to have been considered that the judge must construe the contract though its terms be technical or scientific, and that expert evidence on the point would be for the information of the judge, and not of the jury. In that case a patent for the use of hydrate of iron was contested, by showing that the use of carbonate of iron was not new, and that, in commerce, the scientific distinction between those two substances was not preserved, and Pollock, C.B., thereupon directed a nonsuit. But if their commercial identity had been disputed at the trial, there would have been a question for the jury, and on this ground, *ut semble*, a new trial was granted.

There are cases in which an oral agreement may exist between the parties to a written agreement on a matter collateral and superadded to it, so that both may well subsist together. In such cases oral evidence of the collateral matter is admissible; for the original contract is unaffected by it. Thus, where the parties to an indenture of charterparty afterwards agreed orally for the use of a ship at a period before the charterparty attached, oral evidence of this was held admissible in an action on this latter agreement. *White v. Parkin*, 12 East, 578. Where there was an oral agreement by the landlord to pay £20 towards repairs in consideration that plaintiff would become tenant, and plaintiff accepted a lease and did the repairs, which defendant, the landlord, then promised to repay; held, that plaintiff could recover on an account stated, although the lease itself contained no such agreement. *Seago v. Deane*, 4 Bing. 459. So where a tenant executed a lease, which reserved the right of shooting to the lessor, on an oral promise by the latter that he would keep down the game; held, that the tenant could sue the lessor for breach of this promise. *Morgan v. Griffith*, L. R., 6 Ex. 70; *Erskine v. Adeane*, L. R., 8 Ch. 756. The decision in *Mann v. Nunn*, 43 L. J., C. P. 241, is to the like effect; it was, however, doubted by Blackburn, J., in *Angell v. Duke*, 32 L. T., N. S. 320, E. T. 1875, Q. B. On the sale of land by auction, evidence was admitted of an oral statement by the auctioneer that there was a certain right of way to the land. *Brett v. Clouser*, 5 C. P. D. 376. Where A. orally agreed with a railway company that they should carry his cattle to K. station, and at the same time signed, without noticing its contents, a consignment note for the carriage of the cattle to an intermediate station, E.; it was held, that the oral agreement was admissible in evidence as not contradicting, but being supplemental to the written contract. *Malpas v. L. & S. W. Ry. Co.*, L. R., 1 C. P. 336. Where the plaintiff agreed in writing to purchase certain furniture of the defendant, and by that agreement the defendant was authorized to settle an action of *C. v. L.*, it was held that, in an action for not settling the action of *C. v. L.*, evidence was admissible of a distinct oral agreement to settle that action, made immediately before the written agreement. *Lindley v. Lacey*, 17 C. B., N. S. 578; 34 L. J., C. P. 7. These cases are plainly not exceptions to the general rule.

Nor is it an exception to this general rule that it does not extend to the

exclusion of all the *legal incidents* which by the general law merchant, or common law, attach to certain instruments. Thus, the days of grace allowed to the parties to bills; the necessity of notice of dishonour, &c., are not specified on the bill; so of implied warranties on policies, &c. In such cases no evidence is admissible; for the court will take notice of all legal incidents. It is otherwise in regard to particular usages or local customs, which will be mentioned hereafter; *vide post*, p. 21, *et seq.*

Oral evidence, when admissible to prove a consideration, or to vary the date, or description, &c.] The cases as to proof of consideration stand somewhat apart, and it would be dangerous to draw any inference from them with respect to the general law upon the subject under discussion. It is constantly the practice to show that no consideration has been given for a bill or note, although the instrument bear on its face the words "value received," which clearly import a consideration for the promise contained in the instrument. Upon a contract under seal it is not, as in a contract not under seal, generally necessary to prove that there was any consideration, or the nature of it. But if the consideration comes in question at all, it seems generally to have been permitted to inquire into it, notwithstanding any averment in the deed. Thus where the considerations mentioned in a deed were 10,000*l.*, and natural love and affection, an issue was directed to inquire whether natural love and affection formed any part of the consideration. *Filmer v. Gott*, 4 Bro. P. C. 230. So a deed operating under the Statute of Uses, and reciting no consideration, may be supported by showing that a pecuniary one in fact passed. *Mildmay's case*, 1 Rep. 176. So a deed which recites only a pecuniary consideration may be shown to have been also founded on the consideration of marriage. *Id.*; *Villers v. Beaumont*, Dyer, 146 a; *Tull v. Parlett*, M. & M. 472; and *Clifford v. Turrill*, 1 Y. & C. C. C. 138; 14 L. J., Ch. 390; S. C., on appeal, *Id.* 396. So evidence is admissible to show that the consideration stated in a bill of sale is not the true consideration, and that it is, therefore, as against trustees in bankruptcy and execution creditors, void under the Bills of Sale Act, 1878, s. 8. *Ex pte. Carter*, 12 Ch. D. 908. The same principle applies to the Bills of Sale Act, 1882; see sect. 9, and schedule. A guarantee purported to be "in consideration of your having advanced this day," &c.; oral evidence was admitted to show that the advance was contemporaneous with the guarantee, and was therefore a good consideration. *Goldshede v. Swan*, 1 Exch. 154. See also the following cases in which words of guarantee, founded on a consideration ambiguously expressed, so as to import either a past or future credit, were explained by extrinsic evidence that the credit was *in fact* a future or continuing credit; or that the consideration and guarantee were simultaneous. *Edwards v. Jevons*, 8 C. B. 436; *Colbourn v. Dawson*, 10 C. B. 765; 20 L. J., C. P. 154; *Bainbridge v. Wade*, 16 Q. B. 89; 20 L. J., Q. B. 7; *Hesfield v. Meadows*, L. R., 4 C. P. 595; *Laurie v. Scholefield*, *Id.*, 622. See *Morrell v. Cowan*, 7 Ch. D. 151.

A deed takes effect from the delivery, and not from the date; therefore oral evidence was allowed to show that a lease dated on Lady Day, 1783, and purporting to commence on *Lady Day last past*, was in fact executed after the date, and that the term therefore commenced on Lady Day, 1783, and not 1782. *Steele v. Mart*, 4 B. & C. 272. In such case there is no real contradiction. The same consideration will also explain the ground on which oral proof was permitted to be given by the defendant that the plaintiff had made certain admissions on his examination before commissioners of bankruptcy, although the written examination produced contained no such admissions. *Rowland v. Ashby*, Ry. & M. 231. So, although the written examination, taken by a magistrate on a criminal charge, is the best evidence of such examination, yet any additional statements made by the examined, and

not reduced to writing, may be proved by oral evidence. *Venafr v. Johnson*, 1 M. & Rob. 316.

Although no oral evidence can be used to add to or detract from the description in a deed, or to alter it in any respect, yet such evidence is always admissible to show the condition of every part of the property, and all other circumstances necessary to place the court when it construes an instrument in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. *Baird v. Fortune*, 4 Macq. 127, 149, *per* Ld. Wensleydale; *Accord. Magee v. Lavell*, L. R., 9 C. P. 107, 112. See also *Inglis v. Buttery*, 3 Ap. Ca. 552, D. P. The same rule applies in the case of a will, *vide post*, p. 30; and see *Way v. Hearn*, 13 C. B., N. S. 292; 32 L. J., C. P. 34; *Newell v. Radford*, L. R., 3 C. P., 52; and *Lewis v. Gt. W. Ry. Co.*, 3 Q. B. D. 195, C. A. See, however, *Stanton v. Richardson*, L. R. 7 C. P. 428, 434, *per* Brett, J.

Mere words of description in a deed of conveyance, not operating by way of estoppel, may be contradicted by oral evidence; thus the lessee of land, described as "meadow," may prove it to have been arable in an action by the lessor for ploughing it up; *Skipwith v. Green*, 1 Stra. 610; or he may show that land described as containing 500 acres does not in fact contain so many; S. C. as reported Bac. Ab. Pleas I. 11; or contains many more; *Jack v. McIntyre*, 12 Cl. & Fin. 151; *Manning v. Fitzgerald*, 29 L. J., Ex. 24.

In a settlement case, where the deed of conveyance stated the consideration of the purchase to be 28*l.*, oral evidence was admitted to show that the consideration was in fact 30*l.* *R. v. Scammonden*, 3 T. R. 474; and that money, stated in a deed of apprenticeship to have been paid by J. M., was in fact parish money. *R. v. Llangunnor*, 2 B. & Ad. 616. In these cases, however, the oral proof was admissible, not on the ground of its consistency with the writing, but because the recital in the deed was *res inter alios*, which the parishes were not estopped from correcting even by testimony inconsistent with the writing. So a parish may show a settlement by renting a tenement in parish B., though the lease describes it as in parish A. *R. v. Wickham*, 2 Ad. & E. 517.

[*Oral evidence admissible to prove fraud, illegality, or error.*] Where fraud is imputed, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction; B. N. P. 173; *Paxton v. Popham*, 9 East, 421; for fraud is a matter extrinsic and collateral, which vitiates all transactions, even the most solemn. Thus, in order to set aside a will, oral evidence may be given of what passed at the signing, and what the testator said, to show that his signature was obtained by fraud. *Doe d. Small v. Allen*, 8 T. R. 147. And, in general, matter which in law avoids an instrument, whether it be fraud, forgery, duress, illegality, &c., may be proved orally, however contradictory to its tenor, provided the pleadings be adapted to such evidence. See *Doe d. Chandler v. Ford*, 3 Ad. & E. 649; and 1 Smith's L. Cases, *Collins v. Blantern*, *in notis*.

Evidence is sometimes admissible to show a mistake in a writing; thus a contract, usurious on the face of it, might have been explained by showing it was made so by a clerical error. *Anon.*, *Freem.* 253; *Booth v. Cooke*, *Id.* 264. So a house, misdescribed in a lease as No. 38, may be shown to be in truth No. 35. *Hutchins v. Scott*, 2 M. & W. 816, *per Curiam*. See also *Hutchins v. Groom*, 5 C. B. 515. But where a verdict and judgment were given in evidence to prove a public way, the court will not admit proof that the verdict was entered erroneously by the mistake of the officer. *Reed v. Jackson*, 1 East, 355. The record in the first action should have been amended

by leave of the court. But where a *Nisi Prius* record was put in evidence to prove damages in a suit against the plaintiff, and the *postea* did not show on which of two different counts the damages were in fact given, oral evidence was admitted to prove that they were recovered, substantially, on one of the counts only, this being no contradiction of the record, the verdict and damages having been entered generally. *Preston v. Peeke*, E. B. & E. 336; 27 L. J., Q. B. 424. Proof of a material and substantial error in the frame of a subsisting contract cannot in general be set up in an action upon it; *Perez v. Oleaga*, 11 Exch. 506; 25 L. J., Ex. 65; *Solvency Mutual Guarantee Co. v. Freeman*, 7 H. & N. 17; 31 L. J., Ex. 197; except by way of a claim for rectification under the J. Act, 1873, s. 24 (1-3), on the ground of common mistake. But there is no occasion to reform the contract where an agent is wrongly described as principal; *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273; 1 H. & C. 202; 31 L. J., Ex. 451, Ex. Ch.; or where it has been completely executed according to the intention of the parties; *Steele v. Haddock*, 10 Exch. 643; 24 L. J., Ex. 78; *Luce v. Izod*, 1 H. & N. 245; 25 L. J., Ex. 307; *Vorley v. Barrett*, 1 C. B., N. S. 225; 26 L. J., C. P. 1; or where the full performance has become impracticable by reason of the default of the plaintiff. *Borrowman v. Rossel*, 16 C. B., N. S. 58; 33 L. J., C. P. 111. And in such cases the mistake will afford a defence without rectification. As to when rectification will be ordered, see Story, Eq. Jur. §§ 152, *et seq.*

Oral evidence, when admissible to explain mercantile contracts and words of art.] Where the parties have contracted in writing, in many instances oral evidence is admitted to prove an usage affecting the contract, on the ground that, where such usage exists, the parties must be taken to have made their contract subject to its operation. And such evidence is sometimes admitted as explanatory of the language of the writing, and sometimes as superadding a tacitly implied incident. Thus, oral evidence is always admitted to show the sense in which, according to the custom of merchants, a mercantile contract is to be understood. See 1 Smith's L. Cases, *Wigglesworth v. Dallison*, *in notis*. In such a case it is unobjectionable to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or commerce under investigation. *Robertson v. Jackson*, 2 C. B. 412. And such a question must be put to the witness before he is asked what he understands by the written contract to which it is meant to apply the usage. *Curtis v. Peek*, 13 W. R., 230 M. T. 1861, Ex. Ch.

Where a ship was warranted to depart with convoy, evidence of usage was admitted to show that this meant convoy from the usual place of rendezvous. *Lethulier's case*, 2 Salk. 443. So, to explain the meaning of "days" in a bill of lading; *Cochran v. Retberg*, 3 Esp. 121; to show that the Gulf of Finland is considered by mariners to be within the Baltic; *Uhde v. Walters*, 3 Camp. 16; or the Mauritius to be an East Indian Island. *Robertson v. Money*, Ry. & M. 75. So evidence was admitted to explain the term "privilege" in a contract between shipowner and captain; *Birch v. Depeyster*, 4 Camp. 385; and to show the received meaning of "mess pork of S. & Co." *Powell v. Horton*, 2 N. C. 668. Where the captain of a ship agreed to convey a boat of certain dimensions for the plaintiff, evidence was admitted on behalf of the captain that the practice was to remove the deck of such boats when put on board. *Haynes v. Holliday*, 7 Bing. 587. Apparent variances in bought and sold notes may be reconciled by the evidence of brokers. *Bold v. Rayner*, 1 M. & W. 343; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191, quoted *post*, *Action for not accepting Goods*. Where it was represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence that this was

understood among merchants to mean between the 25th and the end of October, whereas the ship sailed on the 11th. *Chaurand v. Augerstein*, Peake, 43. Oral evidence may be given to explain the meaning of the word *level* in a mining lease; *Clayton v. Gregson*, 5 Ad. & E. 302; and of the words "across the country" in a wager on a race. *Evans v. Pratt*, 3 M. & Gr. 759. In a contract for the purchase of "1,170 bales of gambier," it was held that it might be shown that by the usage of that trade a "bale" meant a compressed package, weighing about two cwt. *Gorriessen v. Perrin*, 2 C. B., N. S. 681; 27 L. J., C. P. 29. See also *Taylor v. Briggs*, 2 C. & P. 525. So where instructions were given by a principal residing out of England to his factor to sell corn, a custom in the London corn market to sell in the factor's own name is admissible to explain the instructions. *Johnston v. Usborne*, 11 Ad. & E. 549. On a sale of goods by a manufacturer who is not a dealer, evidence is admissible of a custom in the particular trade to deliver goods of another manufacturer. *Johnson v. Raylton*, 7 Q. B. D. 438, C.A. A sale of tobacco may be explained to be a sale by sample by the general usage of the trade, although the bought and sold notes are silent as to sample. *Syers v. Jonas*, 2 Exch. 111. So an engagement by a public singer for three years may be explained to mean three theatrical seasons. *Grant v. Maddox*, 15 M. & W. 737. In an action by a shipowner on a contract to pay freight at a certain rate per lb., defendant was allowed to show a custom of the trade at a particular port to allow three months' discount on freights on goods coming from certain ports. *Brown v. Byrne*, 3 E. & B. 703; 23 L. J., Q. B. 313. "After arrival" at a named island may be explained to mean after arrival at a place at sea some miles off the usual port, if it be a place of ordinary anchorage; and this is a question for the jury. *Lindsay v. Janson*, 4 H. & N. 699; 28 L. J., Ex. 315. Where by a charterparty the shipowner agreed to consign the ship to A. B., at Calcutta "on the usual and customary terms," a custom may be proved for consignee to procure the homeward freight on commission; *Robertson v. Wait*, 8 Exch. 299; 22 L. J., Ex. 209; but where the charter provides that the consignment is to be "free of commission," and says nothing of usual terms, the charterer cannot set up such custom by oral evidence in an action against the shipowner for not allowing the consignee to procure the homeward freight. *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J., Ex. 233. "A full and complete cargo of sugar" may be explained to mean full and complete according to the customary mode of packing and loading sugar at the port where it is loaded. *Cuthbert v. Cumming*, 11 Exch. 405; 24 L. J., Ex. 310, Ex. Ch. So "regular turns of loading" or "in turns to deliver," may be explained by local usage. *Leidemann v. Schultz*, 14 C. B. 318; 23 L. J., C. P. 17; *Robertson v. Jackson*, 2 C. B. 412. So the custom of the port as to when lay days commence. *Norden Steam Co. v. Dempsey*, 1 C. P. D. 654. "Fifty tons best palm oil, with a fair allowance for inferior oil, if any," may be explained to be satisfied by the delivery of 50 tons, of which the greater part is inferior. *Lucas v. Bristow*, E. B. & E. 907; 27 L. J., Q. B. 364. A contract in writing to do stone and brickwork at the rate of "3s. per superficial yard of work 9 inches thick, and finding all materials, deducting all lights," was held not to exclude a custom in the trade to reduce all brickwork for the purpose of measurement to 9 inches in thickness. *Symonds v. Floyd*, 6 C. B., N. S. 691. So a contract to do certain work and to deliver "a weekly account of work done" was held not inconsistent with a usage in the building trade, that this clause related not to all the work contracted to be done, but to that part only which was of a particular kind. *Myers v. Sarl*, 3 E. & E. 306; 30 L. J., Q. B. 9. Where there was a written contract for the sale of shares at a certain price, "for payment half in two, half in four months," it was held, that evidence was admissible that the

seller was by usage not bound to deliver the shares until the appointed time for payment unless the buyer chose to pay for them earlier. *Field v. Lelean*, 6 H. & N. 627; 30 L. J., Ex. 168, Ex. Ch. See the case of *Spartali v. Benecke*, *post*, p. 24, and observations thereon. The usage of a particular port, that the underwriters are not liable for general average in respect of the jettison of timber stowed on the deck can be annexed to a policy making the underwriter liable for general average without restriction. *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J., Ex. 217; 7 H. & N. 954; 31 L. J., Ex. 363, Ex. Ch. By a bill of lading of wool freight was to be paid "at the rate of 80s. per ton of 20 cwt. gross weight, tallow and other goods, grain or seed, in proportion as per London Baltic printed rates;" evidence was admitted to show that by the usage of the trade this meant that 80s. per ton of 20 cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian S. Navigation Trading Co. v. Silva*, 13 C. B., N. S. 610. The question whether a cargo "for shipment in June" was satisfied by a cargo which was loaded half in May and half in June, was held by Martin, B., and Lush., J. (*dub. Kelly, C. B., and Blackburn, J.*), to be a question for the jury; *Alexander v. Vanderzee*, L. R., 7 C. P. 530, Ex. Ch. See observations on this case in *Shand v. Bowes*, 2 Ap. Ca. 455, D. P. So, on a sale of goods to be paid for in from "six to eight weeks," the question of the length of credit thereby allowed was left to the jury, the words apart from usage being insensible. *Ashford v. Redford*, L. R., 9 C. P. 20. A written agreement at a yearly salary and a bonus at the year's end in case of the employer's approval, may be qualified by proof of a trade custom to dismiss at a month's notice. *Parker v. Ibbetson*, 4 C. B., N. S. 346; 27 L. J., C. P. 236; and see *post*, *Action for wrongful dismissal*.

With reference to the evidence necessary to support an alleged usage, it was said in *Ghose v. Manickchand*, 7 Moo. Ind. App. 263, 282, that "there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." The usage must be shown to be certain and reasonable, and so universally acquiesced in that everybody in the particular trade knows it, or might know it if he took the pains to inquire. *Plaice v. Allcock*, 4 F. & F. 1074, *per Willes, J.*; *Fozzall v. International Land Credit Co.*, 16 L. T., N. S., 637, *cor. Byles, J.*

Where it is attempted to engraft on a contract some usage of a particular trade or local custom, the opposite party is at liberty to disprove the usage or custom by the like evidence, and for that purpose to show other previous transactions in like cases between the same parties wherein the supposed usage or custom was not acted on. *Bourne v. Gatliffe*, 3 M. & Gr. 643.

If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract and it cannot be got rid of by proof of an oral agreement to waive or vary it. *Fawkes v. Lamb*, 31 L. J., Q. B. 98. See also *Burges v. Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17; *Clapham v. Langton*, 5 B. & S. 729; 34 L. J., Q. B. 46, Ex. Ch.

It has been said that the words "usage of trade" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from the general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, not from evidence *in pais*, and the knowledge of which resides in the breast of the judge. 1 Smith, L. Cases, 7th ed., p. 610; 8th ed.

p. 610. Thus, in *Suse v. Pompe*, 8 C. B., N. S. 538; 30 L. J., C. P., 75; *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289, evidence of a general custom was not admitted to contradict the law merchant. That law has, however, been gradually developed by judicial decisions, ratifying the usages of merchants in the different departments of trade; *Goodwin v. Roberts*, L. R., 10 Ex., 337, 346, per Ex. Ch.; and "where a general usage has been judicially ascertained and established it becomes part of the law merchant which courts of justice are bound to know and recognise." *Id.* citing *Brandão v. Barnett*, 12 Cl. & F. 805, per Lord Campbell. It is not easy to define the period at which a usage so becomes incorporated into the law merchant. See further 1 Smith's L. C. 8th ed., pp. 606-8. See also *Kidston v. Empire Marine Insurance Co.*, L. R., 1 C. P. 535; L. R., 2 C. P. 357, Ex. Ch.

Proof of the usage of trade is not admissible to contradict the plain words of an instrument not used in a technical sense; as where a policy of insurance was "on the ship till moored at anchor 24 hours, and on the goods till discharged and safely landed," evidence of a usage that the risk on the goods, as well as the ship, expired in 24 hours, was held inadmissible to qualify the unequivocal words of the policy. *Parkinson v. Collier*, Park. Ins. 6th ed. 416. So where a charterparty provides that the vessel is to deliver at H., "or so near thereto as she could safely get," a custom that the charterer should take delivery at H. only is excluded. *Hayton v. Irwin*, 5 C. P. D. 130, C. A. See also *The Alhambra*, 6 P. D. 68, C. A. So a contract for payment in money cannot be explained to mean payment in goods; but it may be shown that goods were in fact accepted as cash in the particular transaction. *Smith v. Battams*, 26 L. J., Ex. 232. So where goods are sold under a memorandum to be paid for by bill, oral evidence is inadmissible to show that bill means approved bill. *Hodgson v. Davies*, 2 Camp. 530. So in an action on a warranty of "prime singed bacon," oral evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted as "prime singed bacon." *Yates v. Pym*, 6 Taunt. 446; 2 Marsh. 141. So oral evidence is not admissible to explain the meaning of the words "More or less" in a mercantile contract; *semble*, *Cross v. Eglin*, 2 B. & Ad. 106; or to show that "cargo" and "freight" apply to passengers as well as goods; *Lewis v. Marshall*, 7 M. & Gr. 729; or to show that boats on the outside of a ship, slung upon the quarter, are not protected by a marine policy in the usual form on the ship and furniture; *Blackett v. R. Exchange Assur. Co.*, 2 C. & J. 244; or to show a custom within the port of London that the insurers of jettisoned goods are only liable for the share of the loss cast upon the owner of jettisoned goods in the general average statement; *Dickenson v. Jardine*, L. R., 3 C. P. 639; or to show that a contract to sell "ware potatoes" means a certain sort of "ware potatoes;" *Smith v. Jeffries*, 15 M. & W. 561; or that, on a contract to sell wool "to be paid for by cash in one month, less 5 per cent. discount," the vendor has a lien on it for payment by usage of the trade; *Spartali v. Benecke*, 10 C. B. 212; 19 L. J., C. P. 293; *Godts v. Rose*, 25 L. J., C. P. 61. The case of *Spartali v. Benecke*, *supra*, was a good deal observed upon by the Ex. Ch. in *Field v. Lelean*, 6 H. & N. 627; 30 L. J., Ex. 170; *ante*, p. 23; but the difference of opinion is not as to the principle, but as to the meaning of the contract and the effect of the custom. See also *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J., Ex. 233; *ante*, p. 22. Oral evidence of what the parties meant by a provision in the sale of a cargo, that "14 days are to be allowed for delivery," was not admitted; but if evidence of a general usage explaining those words had been offered, it would perhaps have been admissible. *Sotilichos v. Kemp*, 3 Exch. 105. In a contract for the sale of tallow by defendant in the name of a broker who was his known representative, the

defendant was not allowed to show a custom of trade upon such a contract to look to the broker for its completion. *Trueman v. Loder*, 11 Ad. & E. 589. But usage of trade is admissible to show that the broker is personally liable on a contract of sale on behalf of an undisclosed principal. *Hymfry v. Dale*, 7 E. & B. 266; 26 L. J., Q. B. 137; E. B. & E. 1004; 27 L. J., Q. B. 390, Ex. Ch. See also *Cropper v. Cook*, L. R., 3 C. P. 194, 199. The evidence of such usages may be confirmed by evidence of a similar custom in a similar trade in the same place, e.g., in the colonial market, to corroborate the usage in the fruit market. *Fleet v. Murton*, L. R., 7 Q. B. 126. So by evidence of a similar custom in the same trade at a neighbouring place; *Plaice v. Allcock*, 4 F. & F. 1074, cor. Willes, J. Where a charterparty was signed by the defendants, "as agents for merchants," evidence of a custom was admitted, to show that the defendants were liable on the charterparty as principals, if their principal's name was not disclosed within a reasonable time. *Hutchinson v. Tatham*, L. R., 8 C. P. 482. The distinction between these latter cases and *Trueman v. Loder*, *supra*, is founded on the rule that oral evidence may be given to establish the right or liability of an undisclosed principal, but not for the purpose of excluding from liability a person liable on the face of a written contract, for the effect of evidence admitted for this latter purpose would be to contradict the written document. But a custom that an agent's authority to underwrite policies is limited to a particular sum is good, though the insured is not aware of the limitation. *Baines v. Ewing*, L. R. 1 Ex. 320.

It has been doubted whether the practice of admitting oral evidence in these cases has not been carried to an inconvenient length. See *Anderson v. Pitcher*, 2 B. & P. 168. "How far a mercantile contract reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of the trade to which it relates, is a question which it would be difficult to answer with exactness and precision." *Per Tindal, C. J.*, in *Whittaker v. Mason*, 2 N. C. 369, 370; and *per Cur.* in *Trueman v. Loder*, *supra*, "The cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract."

The usages of a market are binding on principals ordering goods to be bought on a market by their agents; *Iceland v. Livingston*, L. R., 2 Q. B. 99, 107 (affirm. L. R. 5 H. L. 395, on another ground); *Bayliffe v. Butterworth*, 1 Exch. 425; *Moxed v. Paine*, L. R. 6 Ex. 132, Ex. Ch.; *Merry v. Nickalls*, L. R., 7 H. L. 530. It is immaterial whether the principal knew of the usage or not, *Grissell v. Bristow*, L. R., 4 C. P. 49; provided the custom regulate the mode of performing the contract only, and do not change its intrinsic character. *Mollett v. Robinson*, L. R. 7 H. L. 802, 836. A person employed to act as broker cannot, by the custom of the market, assume the character of principal, where his employer is ignorant of the custom. S. C. The customer of a bank is bound by the custom of bankers. *Emanuel v. Roberts*, 9 B. & S. 121. So are mercantile persons having dealings with bankers. *Currie v. Misa*, 1 Ap. Ca. 554, D. P.

Oral evidence, when admissible to control or explain agricultural contracts.] A custom affecting the contract may be proved by oral evidence in other, as well as in mercantile, contracts; as in the case of agricultural contracts. Thus, it may be proved that a heriot is due by custom on the death of a tenant, though not expressed in the lease. *White v. Sayer*, Palm. 211. Or, that a lessee by deed or writing is entitled by custom to an away-going crop, though it be not mentioned in the deed. *Wigglesworth v. Dallison*, 1 Doug. 201; *Senior v. Armytage*, Holt, N. P. 197. But where a covenant

excludes the customary right by an express provision on the subject-matter of the custom, evidence of such right is inadmissible. *Webb v. Plummer*, 2 B. & A. 746; *Roberts v. Barker*, 1 Cr. & M. 808; *Clarke v. Royston*, 13 M. & W. 752. So where a brickfield was let at a yearly rent of 3s. per 1,000 bricks made, it was held that evidence of a custom that a lease of brickland on those terms should operate as a longer tenancy than a yearly one, was inadmissible. *In re Stroud*, 8 C. B. 502. Yet the custom may still prevail, though the terms of the *holding* are inconsistent with it, if it only relates to the period of *quitting*. *Holding v. Pigott*, 7 Bing. 475. And even where there is an express stipulation respecting the quitting, it may not always be sufficient to exclude the custom. Thus, where the custom was for the tenant to be paid for the last year's ploughing and sowing, and to leave the manure if the landlord would buy it; and the lease provided that the tenant should spend more manure than the custom required, leaving the rest to be paid for by the landlord at the end of the term: held that the tenant was still entitled to be paid for the last year's ploughing and sowing under the custom. *Hutton v. Warren*, 1 M. & W. 466. A custom to sell flints turned up in the ordinary course of good husbandry for the tenant's benefit is not inconsistent with a reservation of minerals to the landlord. *Tucker v. Linger*, 8 Ap. Ca. 508, D. P. On the lease of a rabbit warren, oral evidence was admitted to show that by the custom of the county, the word "thousand" means 1,200 when applied to rabbits. *Smith v. Wilson*, 3 B. & Ad. 728. A contract for the sale of cider may be explained, by local usage, to mean apple juice before it has been made into cider in its usual form. *Studdy v. Sanders*, 5 B. & C. 628. A sale of hops "at 100s." may be explained to mean 5l. per cwt. *Spicer v. Cooper*, 1 Q. B. 424. A contract of hiring may be qualified by proof of customary holidays. *R. v. Stoke upon-Trent*, 5 Q. B. 303.

Oral evidence, when admissible to explain words having a statutory meaning.]

Certain weights and measures have been fixed by the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), which by sect. 19 provides that a contract made by any other measures than those defined by the Act is void. The earlier acts under which *Jones v. Giles*, 11 Exch. 393, was decided did not contain this provision. The general rule is that where a statute has given a definite meaning to a word denoting quantity, evidence of custom is not admissible to show that it is used in a written contract in another sense. *Smith v. Wilson*, 3 B. & Ad. 728, 732, 733. See also *Wing v. Earle*, Cro. Eliz. 267; *Noble v. Durell*, 3 T. R. 271; *Hockin v. Cooke*, 4 T. R. 314; *S. Cross, Master of, v. Ld. Howard de Walden*, 6 T. R. 338.

A somewhat similar question arises upon the statute 24 Geo. 2, c. 23, which changes the style. In *Furley d. Mayor, &c., of Canterbury v. Wood*, 1 Esp. 198, Runnington on Eject., 2nd ed. 129, it was held by Ld. Kenyon that evidence was admissible to show that by the custom of the country the word "Michaelmas," in a notice to quit, meant "Old Michaelmas." It has been since assumed that this was a parol demise; but as the lands are stated to have been held by lease from a corporation, this was probably not so. In *Doe d. Spicer v. Lea*, 11 East, 312, however, it was held that evidence was rightly rejected when offered to show that "the feast of S. Michael," in a lease under seal, meant Old Michaelmas. A few days afterwards, *M'Donald, C. B.*, held that a notice to quit at "Michaelmas" might be shown to mean "Old Michaelmas." *Doe d. Hinde v. Vince*, 2 Camp. 256: S. P. ruled by Ld. Ellenborough in *Doe v. Brookes*, at Hereford, same assizes, *ut audiui*. *Id.* 257, n. It does not appear whether the leases in these last two cases were by deed or parol. In *Doe d. Hall v. Benson*, 4 B. & A. 588, the distinction between leases under seal and those not so, was

taken by the court, and it was held that on a parol demise it might be shown that "Lady Day" meant "Old Lady Day." The cases of *Doe d. Peters v. Hopkinson*, 3 D. & Ry. 507; and *Rogers v. Hull Dock Co.*, 34 L. J., Ch. 165, are to the same effect. In pleading, it was held that "Martinmas" must mean "New Martinmas," even though followed by the words, "to wit, the 23rd of November," which is the day on which Old Martinmas falls. *Smith v. Walton*, 8 Bing. 235. In many parts of the country the practice of letting lands, according to the old style, is still retained; and many text writers have expressed a general opinion that evidence of a custom of the country is always admissible to show that the feast day mentioned in the lease is referable to the old style, even though the lease be by deed. *Vide tamen*, 1 Smith's L. Cases, 8th ed., 619, 620.

[Oral evidence, when admissible to explain ancient charters, grants, &c.] Long user may serve to explain an ambiguous act of parliament. *Stewart v. Lawton*, 1 Bing. 377. In the construction of ancient charters, expressed in obscure or general terms, oral evidence has always been admitted to prove the continual and immemorial usage under the instrument. 2 Inst. 282; *R. v. Varlo*, Cowp. 248; *Chad v. Tiled*, 2 B. & B. 406. Thus, in a crown grant of "tithes," contemporaneous leases, proceedings in causes, and oral testimony, may be resorted to in order to show the species of tithes intended to be conveyed. *Lucton School, Governors of, v. Scarlett*, 2 Y. & J. 330. An ancient crown grant of a seigniorship or lordship, or of "terra de Gower," may be shown by modern user to include the sea-shore between high and low water. *Beaufort, Dk. of, v. Mayor of Swansea*, 3 Exch. 413; see also *Hastings, Corporation of, v. Ivall*, L. R., 19 Eq. 558; although the grant from the crown contains no appropriate words. *Calmady v. Rowe*, 6 C. B. 861. Where a private deed of 1656 gave the nomination of a curate to "inhabitants," it was held that the word was properly explained by past usage to mean all housekeepers. *Att.-Gen. v. Parker*, 3 Atk. 576. So it was held that in an ancient charter, the word "inhabitants" might be explained by local usage. *R. v. Mashiter*, 6 Ad. & E. 153, and this decision was recognised in *R. v. Davie, Id.*, 374, 386, where the same word, in a charter of Edward VI., was explained by usage to mean inhabitants paying church and poor-rates. So where an old charter granted and confirmed certain port-duties, it may be shown by user that the grantee is also entitled to other immemorial port duties not named in the charter. *Bradley v. Newcastle, Pilots of*, 2 E. & B. 427; 23 L. J., Q. B. 35, Ex. Ch.

There seems to be no distinction in this respect between charters and private deeds. *Withnell v. Gartham*, 6 T. R. 398. The words "three acres of meadow," in a surrender and admittance, may be confined by long user to the *prima tonsura*; *Stammers v. Dixon*, 7 East, 200; and *pastura bosci* may be explained by usage and later admittances to mean the soil and wood itself. *Doe d. Kinglake v. Bevis*, 7 C. B. 456. So evidence of usage is admissible to show what is comprehended in parcels described by words of a general nature or doubtful import. *Waterpark, Ld. v. Fennell*, 7 H. L. C. 650; *Hastings, Corporation of, v. Ivall*, *supra*. See also *Forbes v. Watt*, L. R., 2 H. L. Sc. 214.

But evidence of usage, however long, will not be admitted to overturn the clear words of a charter. *R. v. Varlo*, *supra*. And in the case of modern deeds evidence of the acts of the parties is not admissible to show their construction of it. *Clifton v. Walmsley*, 5 T. R. 565; *Iggulden v. May*, 9 Ves. 333; 2 N. R. 449, Ex. Ch. Even the conditions of sale, and the admissions of the grantee, are insufficient and inadmissible to narrow the operation of a deed of conveyance; *Doe d. Norton v. Webster*, 12 Ad. & E. 442; although we have seen that, in the absence of the deed, such admis-

sions might be evidence of its contents. *Ante*, p. 2. Nor can the subsequent correspondence or conduct of the parties be submitted to a jury as evidence by which "alone" to explain the meaning of a contract. *Simpson v. Margitson*, 11 Q. B. 23; *Doe d. Morgan v. Powell*, 7 M. & Gr. 980.

Oral evidence admissible to discharge written agreements.] A deed cannot be revoked or discharged by parol, i.e. word of mouth, or writing not under seal; *Rutland's (Countess of) Case*, 5 Rep. 26 a; *West v. Blakeley*, 2 M. & Gr. 729, 751, *et seq.* But an executory agreement in writing not under seal (other than a bill of exchange or promissory note, *vide infra*) may, before breach, be discharged by a subsequent oral agreement. B. N. P. 152. After breach, it cannot be discharged except by release under seal, or accord and satisfaction, *Id.*; *Willoughby v. Backhouse*, 2 B. & C. 824; or by proof of a valid agreement substituting a new cause of action in place of the old, for an invalid agreement will not discharge the former one. *Case v. Barber*, T. Raym. 450; *Noble v. Ward*, L. R., 1 Ex. 117; L. R., 2 Ex. 135, Ex. Ch. In these cases, wherever the subsequent oral agreement has had the effect, in point of law, of varying or discharging the original one, it is (apart from statute, as to which *vide infra*) admissible in evidence. Thus, in an action for not accepting goods, where it appeared that the agreement in writing was to deliver at a fixed time, the plaintiff may show a subsequent extension of the time by oral agreement. *Cuff v. Penn*, 1 M. & S. 21. Where an auctioneer sold for 6*l.* an article described as silver in a printed catalogue, but which he publicly stated at the sale to be only plated; held, that this was an oral sale of a plated article. *Eden v. Blake*, 13 M. & W. 614.

A distinction, however, is to be observed on this head between simple contracts in writing under the Stat. of Frauds, and contracts at common law. In the former case, an oral contract will not be admitted to show a subsequent variation in the written contract; as where several lots of land were bought together, it cannot be shown that the purchaser has, orally, waived the contract as to one lot to which the vendor could not make title; *Goss v. Nugent, Ltd.*, 5 B. & Ad. 58; or, that the parties varied the day of completion. *Storell v. Robinson*, 3 N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 Ad. & E. 57; *Noble v. Ward, supra*. See also *Sanderson v. Graves*, L. R., 10 Ex. 234. But it would have been otherwise if the contract had not been subject to the control of a statute; for where such a contract has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing, either altogether to waive, dissolve, or alter the former agreement, or to qualify the terms of it, and thus to make a new contract to be proved partly by the written agreement, and partly by the subsequent oral terms engrafted upon it. *Goss v. Nugent, Ltd.*, 5 B. & Ad. 65, *per cur.*

A contract within the Stat. of Frauds can, it seems, be wholly discharged orally. *Goman v. Salisbury*, 1 Vern. 240; *Goss v. Nugent, Ltd.*, 5 B. & Ad. 68, *per cur.* See, however, *Harvey v. Grabham*, 5 Ad. & E. 61, 74, *per cur.* But a contract in writing, good under the Stat. of Frauds, is not rescinded by a subsequent invalid oral contract intended to be substituted for the former one. *Noble v. Ward, supra*. By the Bills of Exchange Act, 1882, ss. 62, 89, the renunciation of the holder of a bill of exchange or promissory note of his rights against the acceptor must be in writing unless the bill or note is delivered up to the acceptor.

Oral evidence admissible to explain latent ambiguity.] Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of oral evidence, the same description of evidence is admitted to explain it; for example, where a testator devises his estates of Blackacre, and has two

estates called Blackacre, evidence may be admitted to show which of the Blackacres was meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended. *Per* Gibbs, C. J., *Doe v. Chichester*, 4 Dow, 93; *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235. And where the description of the devisee, or thing devised, is true in part, but not true in every particular, oral evidence is admissible to show the person or thing intended, provided there be enough on the face of the will to justify the application of the evidence; *per Cur.* in *Miller v. Travers*, 8 Bing. 248-9; *Charter v. Charter*, L. R., 2 P. & M. 315; L. R., 7 H. L. 364. Thus, an error in a Christian or surname may be proved. S. CC., and see *Careless v. Careless*, 1 Meriv. 384. Where the grantor has no lands agreeing exactly with the description in the deed, the lands intended may be shown by the contract of sale, or by letters written between the parties and their agents. *Beaumont v. Field*, 1 B. & A. 247. Where a farmer contracted in writing (as required by the Stat. of Frauds) to sell "his wool" at a certain price, evidence of a previous conversation between him and the buyer was held admissible to prove that his "wool" meant wool in his possession bought by him of other farmers as well as wool of his own growth, but not admissible to prove that only a limited quantity of such wool was intended to be bought. *Macdonald v. Longbottom*, 1 E. & E. 977; 28 L. J., Q. B. 293; 1 E. & E. 987; 29 L. J., Q. B. 256, Ex. Ch. See also *Buxton v. Rust*, L. R., 7 Ex. 280, 281, Ex. Ch., *per* Willes, J. So in construing a written contract of service under which A. was "to enter into the employ" of B., or A. was "to give the whole of his services to B.," oral evidence is admissible to show in what capacity A. was to serve B. *Mumford v. Gething*, 7 C. B., N. S. 305; L. J., 29 C. P. 105; *Price v. Mouat*, 11 C. B., N. S. 508; even although the Statute of Frauds requires a written contract. S. C. See also *Chadwick v. Burnley*, 12 W. R. 1077; T. T. 1864, Q. B. Where by a written agreement purporting to be between a company and the plaintiff, three of the directors of the company, who signed the same, agreed, in consideration of the advance of 500*l.* by the plaintiff to the company, to repay the same to the plaintiff, oral evidence was held admissible to prove that it was binding on the directors personally. *McCollin v. Gilpin*, 6 Q. B. D. 516, C. A.

Where a devise was to S. H., second son of T. H., but in fact S. H. was the third son, evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or the description. *Doe d. Le Chevalier v. Huthwaite*, 3 B. & A. 632. There are also other authorities for admitting evidence that the testator was accustomed to misname a person, and thus to show who was meant by him, although there be a person in existence whose name corresponds with that in the will. *Blundell v. Gladstone*, 11 Sim. 467; 1 H. L. C. 778; *Lee v. Pain*, 4 Hare, 251. So by "my nephew, J. G.," testator's wife's nephew may be shown to be meant, though the testator also had a nephew J. G. *Grant v. Grant*, L. R., 2 P. & M. 8; *Id. v. Id.*, L. R., 5 C. P. 380; *Id.* 727, Ex. Ch.; *Sherratt v. Mountford*, *post*, p. 30. See *Wells v. Wells*, L. R., 18 Eq. 504, *cor.* M. R., *contra*. Where the devise was to John A., grandson of T. A., with a charge in favour of "each of the brothers and sisters" of the said John A., and it appeared that there were two grandsons of T. A., both named J. A.; held, that oral declarations of the testator were admissible to show which was meant, although it also appeared that only one of the grandsons had several brothers and sisters. *Doe d. Allen v. Allen*, 12 Ad. & E. 451. In the case of a devise to testator's niece, remainder to her three daughters, M., E., and A., the niece at the time of making the will had two legitimate daughters, M. and A., and one illegitimate, E.: held that the claim of the latter might be rebutted by showing that the niece formerly had a legitimate

daughter, E., and that the testator knew nothing of the death of the legitimate, or the birth of the illegitimate, E. *Doe d. Thomas v. Beynon*, *Id.* 431. See also *Hill v. Crook*, *infra*.

Evidence of the testator's declaration of *intention* is only admissible where the language is clear and unambiguous, but the ambiguity arises from some of the circumstances admitted in proof, as to which of two or more persons the testator intended to express. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363, 369; *Charter v. Charter*, L. R., 7 H. L. 364. Where a devise was to John H., the eldest son of John H., and it appeared that John H., the father, had an eldest son named Simon, and a son by a second marriage named John; held, that the declarations of the testator were not admissible to show which was meant. *Doe d. Hiscocks v. Hiscocks*, *supra*. Where the devise was to the testator's "nephews," and evidence had been adduced to show that he had no nephews, but that his wife's nephews were meant, it was held that evidence that these could not have been intended by the testator was not admissible, without also showing some other class who were intended to take. *Sherratt v. Mountford*, L. R., 8 Ch. 928.

A devise to "my dear wife C." cannot be defeated by showing that the deviser had a lawful wife, M., alive when he went through a form of marriage with C. *Doe d. Gains v. Rouse*, 5 C. B. 422. But where B. makes a devise to his wife A., the devise may be defeated by showing that A. fraudulently concealed from B. that she had a husband living when she went through a form of marriage with B. *Wilkinson v. Jonghin*, L. R., 2 Eq. 319, following *Kennell v. Abbott*, 4 Ves. 802. Where a fine was levied of 12 messuages in Chelsea, and it appeared that the cognisor had more than 12 messuages in Chelsea, oral evidence was admitted to show which messuages in particular the cognisor intended to pass. *Doe d. Bulkeley v. Wilford*, Ry. & M. 88; S. C., 8 D. & Ry. 549.

It may be laid down as a general rule, that all facts relating to the subject of the devise, such as that it was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in a will. Parke J., in *Doe d. Templeman v. Martin*, 4 B. & Ad. 785; *Webber v. Stanley*, 16 C. B., N. S. 698, 751, 752; 33 L. J., C. P. 217, 220, *per cur.*; Wigram on *Interp. Wills*, 51. Even the value of the property, and the charges upon it in the will may be shown in explanation of it. *Semb. Nightingall v. Smith*, 1 Exch. 879. See also *Allgood v. Blake*, L. R., 8 Ex. 160, 162, Ex. Ch. In construing a will the court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired. *Hill v. Crook*, L. R., 6 H. L. 265, 277; *Charter v. Charter*, L. R., 7 H. L. 364, *per Lds. Cairns C. & Selborne*. See further, *ante*, p. 20.

Where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. Thus, where a testator devised his "estate at Ashton," it was held that oral evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; S. C. 4 Dow, 65; *Webber v. Stanley*, *supra*; *Pedley v. Dodds*, L. R., 2 Eq. 819. See also *Carruthers v. Sheddin*, 6 Taunt. 14. But a devise of lands "in parish D.," will pass lands of which *part* only is in D., if it be shown by oral evidence that all was reputed to be in it. *Anstee v. Nelms*, 1 H. & N. 225; 26 L. J., Ex. 5; *Whitfield v. Langdale*, 1 Ch. D. 61. Where words have acquired a precise and technical meaning, no other meaning can be applied to them. *Per Lord*

Kenyon, Lane v. Earl of Stanhope, 6 T. R. 352. In the case of a legacy to the testator's "heir," it cannot be shown that a testator was in the habit of calling a person his heir who was not so. *Mounsey v. Blamire*, 4 Russ. 384. If a will names the devisee and it be shown orally that there are several to whom the name applies; yet this is not enough to let in oral evidence of intention, where it can be collected from the will itself who was intended. *Doe d. Westlake v. Westlake*, 4 B. & A. 57; *Webber v. Corbett*, L. R. 16 Eq. 515.

Where the ambiguity is not latent, or raised by extrinsic evidence, but patent or apparent on the face of the instrument, oral evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name in a will, oral evidence cannot be admitted to show whose name was intended to be inserted. *Baylis v. Att.-Gen.*, 2 Atk. 239. Where the names of the devisees in a will of real property were all indicated only by single letters, a card kept by the testator separate from his will, containing "a key" to the letters, and showing the person meant by each, was held inadmissible to explain it, though referred to in the will. *Clayton v. Nugent, Ltd.*, 13 M. & W. 200. But where a blank was left for the Christian name only, oral evidence was admitted to prove the individual intended. *Price v. Page*, 4 Ves. 680. But see *Doe d. Gord v. Needs*, 2 M. & W. 139. So in case of a devise "to Mrs. G.," the Chancellor referred it to the Master to receive evidence to show the person intended, who found that the testator invariably called a Mrs. Gregg by the name of "Mrs. G." *Abbott v. Massie*, 3 Ves. 148. Where a will mentioned George, the son of George Gord, and also George the son of John Gord, a bequest to "George the son of Gord," was explained by proof of the declarations of the testator to mean George the son of George Gord. *Doe d. Gord v. Needs*, 2 M. & W. 129. In reply to the argument that this was a *patent* ambiguity, it was said that it could only appear ambiguous by showing *abundé* the non-existence of a George the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had. If an agreement, unambiguous on the face of it, is shown by extrinsic evidence to have a different meaning from that which it imports, and the extrinsic facts are undisputed, the construction of it is for the judge, who ought not to leave it to the jury as a question of the intention of the parties. *Semb. Hitchin v. Groom*, 5 C. B. 515.

Where a blank is left in a written agreement which need not have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement be to deliver goods to the value of less than 10*l.*, and a blank be left for the quantity of goods to be delivered), in such a case it would seem that in an action for the non-performance of the contract, oral evidence may be admitted to supply the defect. 1 Phill. Ev. 521. An instrument so imperfect on the face of it is no perfect contract at all so as to exclude oral evidence. As to the effect of omissions in a contract within the Statute of Frauds, see *post*, *Action for not accepting goods*. Where, in the entry of an appointment to a curacy in the bishop's register, a blank was left for the patron's name, it was held that this might be supplied by oral evidence. *Meath, Bp. of, v. Ld. Belfield*, 1 Wils. 215. A demise offered in evidence was a printed blank form filled up and altered for use; held, that the court might look at the parts struck out in order to ascertain the intent of the parties in what remained. *Strickland v. Maxwell*, 2 Cr. & M. 539.

Oral evidence admissible on questions of parcel or no parcel.] Where the question is "parcel or no parcel," oral evidence is admissible to explain a writing. Thus, where a testator devised "all his farm called Trogues

Farm," it was held that it might be shown of what parcels the farm consisted. *Goodtitle d. Radford v. Southern*, 1 M. & S. 299. But where a deed professes to convey a farm as described on a schedule and map annexed, a field not included in the map or schedule, though always treated as part of the farm, will not pass. *Barton v. Daves*, 10 C. B. 261; 19 L. J., C. P. 302. Where the testator devised two cottages, one described as being in the occupation of A., and the other of B.; and it appeared that the testator had two cottages which had been internally divided, so that part only of one was occupied by A., and part of the other occupied by B.; it was held (Erle, J., *dissent.*) that only the portions of the cottages so occupied passed by the devise, and oral evidence was not admissible to show that he meant the entire cottages to pass. *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227; 20 L. J., Q. B. 61. Where a lease professed to demise premises and a yard, extrinsic evidence was admitted to rebut the presumption that a cellar under the yard was also intended to pass. *Doe d. Freeland v. Burt*, 1 T. R. 701. So in case of a written agreement to convey "all those brick-works in the possession of A. B.," oral evidence of what passed on making the agreement was admitted to show what brick-works were intended to pass. *Paddock v. Fradley*, 1 C. & J. 90. Although the question of parcel or no parcel is for the jury, the judge must tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. *Lyle v. Richards*, L. R., 1 H. L. 222. Conditions of sale, shown to a purchaser at the time of sale, are evidence against him of what was then reputed parcel of the premises conveyed to him by deed. *Murly v. M'Dermott*, 8 Ad. & E. 138. But they will not narrow the language of the conveyance. *Doe d. Norton v. Webster*, 12 Ad. & E. 442. See also *Glave v. Harding*, 27 L. J., Ex. 286.

PRESUMPTIVE EVIDENCE.

Presumptive evidence is usually so called in contradistinction to direct or positive proof whether written or oral; though all moral proof is, in strictness, founded on probability and presumption. Thus, a fact attested by the direct evidence of an ocular witness can only be admitted to be true on the presumption that the witness neither deceives nor is deceived. Perhaps the principal distinction is, that what is usually called a presumption may be rebutted without necessarily impugning the testimony upon which it rests; but direct testimony cannot be impeached without attacking its credibility. Presumptive evidence is not, in its nature, secondary to direct evidence. Thus, payment of rent may be proved by the positive evidence of a person who saw it paid; yet it may also be proved by the production of a receipt for later arrears, which affords a presumption that the earlier arrears are satisfied, without laying any ground for the introduction of such evidence by showing that positive evidence cannot be procured. See observations in *Doe d. Welsh v. Langfield*, 16 M. & W. 513.

Some presumptions are artificial, and legally admit of no contradiction by contrary evidence; of this kind was the presumed revocation of a will by a subsequent alteration of the property. *Goodtitle d. Holford v. Otway*, 2 H. Bl. 522. So some damage is conclusively presumed to result from an unlawful act done by the defendant and actionable *per se*.

Another class of presumptions includes those cases in which a jury will be directed by the court to presume a fact, of which no evidence has been given. Thus a bill of exchange is always presumed to be given for a good consideration. *Philliskirk v. Pluckwell*, 2 M. & S. 395. So the law always presumes innocence; *vide post*, p. 89. So the jury ought to be told to

presume legitimacy, *Banbury Peerage case*, 1 Sim. & St. 153; and marriage from cohabitation, except in prosecutions for bigamy, and formerly in actions for adultery; *Doe d. Fleming v. Fleming*, 4 Bing. 266; *Campbell v. Campbell*, L. R., 1 H. L. Sc. 182; *Neo v. Neo*, L. R., 6 P. C. 382, 386.

The law presumes in favour of possession, see *Lee v. Johnstone*, L. R., 1 H. L. Sc. 426; and, in the case of land, presumes the highest estate in it, viz., a seisin in fee. See *post*, p. 37. A good tenant to the præcipe is presumed in support of an old recovery. Gilb. Ev. 27. A deed thirty years old, and in unsuspected custody, is presumed to have been duly executed, *post*, tit. *Proof of Deeds*, &c. Long possession is a presumption of the regular endowment of a vicarage. *Crimes v. Smith*, 12 Rep. 4. So the continuance of things in *statu quo* will be generally presumed; as where the plaintiff, being slandered in his official character, proves his appointment to the office just before the libel, his continuance in office at the time of the libel need not be proved, though averred, if such continuance be consistent with the nature of the office. *R. v. Budd*, 5 Esp. 230; *Steward v. Dunn*, 12 M. & W. 655. So proof of official character at a certain time may in some cases be evidence that the party had that character within a reasonable time before. *Doe d. Hopley v. Young*, 8 Q. B. 63. Every place is presumably within some parish. *R. v. S. Margaret's*, 7 Q. B. 569. But a place, named generally, is itself presumed to be a vill; at least such was the old law; for there may be extra-parochial places, but all places in England are either villis or within a vill. *Adeson v. Otway*, Freem. 228, 240. So the law presumes that a party intended that which is the immediate or probable consequence of his act. *R. v. Dixon*, 3 M. & S. 11, 15. In such cases, in the absence of contrary proof, the jury are, it should seem, as much bound to find agreeably to the legal presumption, as they are to find according to the law as explained by the judge.

A third class of presumptions is exclusively within the province of the jury, and they occur when direct proof of a fact is offered to the jury as probable evidence from which they may infer another fact. As where a witness says that he lent a certain printed book to A. B., who afterwards returned to him a book exactly like it, which he believes to be the same but cannot swear to its identity, this is proof of identity; for it is more probable that it was the same than another. *Fryer v. Gathercole*, 4 Exch. 262.

There is a species of presumption not uncommonly urged in the addresses of a counsel to a jury, viz., the presumption that the testimony of a witness who might be, but is not, called, is unfavourable to the party who omits to call him. So it is sometimes treated as a legitimate inference that a document, tendered in evidence by A. and objected to by B., is unfavourable to the case of B. Thus, where a document was offered in evidence to confirm the statement of a witness, but was rejected by the judge, it was held to be no misdirection for the judge to tell the jury that the document might be assumed, against the objecting party, to be one which confirmed the testimony of the witness. *Sutton v. Davenport*, 27 L. J., C. P. 54. Such presumptions are of no value as evidence *per se*, and are not worth much except under special circumstances. If the witness, not called, is present at the trial, he may be called by the opposite party. If not present, his absence may be owing to other causes than that of wilful suppression. Where the document is excluded by the ruling of the judge, it is because the law presumes that the ends of justice will not be advanced by the reading of it, and it seems a strong thing for the court to invite inferences against the objecting party, though counsel cannot be restrained from addressing any, however fallacious, arguments to the jury. But, generally, there is a fair presumption against a party who keeps back a document in his own possession. *Att.-Gen.*

v. *Windsor, Dean of*, 24 Beav. 679. See also the observations hereafter on not calling a party as a witness, *Proof by witnesses*. We have seen that the refusal of a party to produce a document after notice to produce is not evidence *per se*; ante, p. 13; accord. *Chaplin v. Reid*, 1 F. & F. 315; but it is matter of observation to the jury. S. C.

The following are a few of the most useful and usual cases of presumption:—

The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years, and it ought to be so presumed by the jury if there be nothing in evidence to negative such presumption. *R. v. Jolliffe*, 2 B. & C. 54; *Jenkins v. Harvey*, 1 C. M. & R. 877. The flowing of the tide is presumptive evidence of a public navigable river; *Miles v. Rose*, 5 Taunt. 705; but the strength of this *prima facie* evidence depends upon the situation and nature of the channel; *R. v. Montague*, 4 B. & C. 602; and long obstruction of the right of navigation is presumptive evidence of its legal extinction by natural or legal means. S. C. Land lying between high and low-water marks on the sea shore, or the banks of a navigable river is, *prima facie*, extra-parochial. *R. v. Musson*, 8 E. & B. 900; 27 L. J., M. C. 100; *Bridgewater Trustees v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4. But for civil parochial purposes such land is now, by 31 & 32 Vict. c. 122, s. 27, no longer extra-parochial.

Cujus est solum ejus est usque ad cælum et ad inferos, is a maxim juries are directed to observe.

A letter is presumed to have been written on the day on which it is dated, as against the writer. *Hunt v. Massey*, 5 B. & Ad. 902. And it may be evidence of the date as against a third person; thus, where indorsee sued the acceptor, who pleaded that plaintiff's indorser took the bill with notice that the defendant was not liable upon it, and indorsed it with like notice to plaintiff, it was held that defendant might prove that the indorser had such notice by producing letters written by him to defendant; and that the date on them was evidence that the letters had been written before the indorsement. *Potez v. Glossop*, 2 Exch. 191. The last decision was accompanied with some expression of doubt by the court; it was, however, followed in *Malpas v. Clements*, 19 L. J., Q. B. 435, where in an action by indorsee against acceptor, a paper, signed by the drawer and purporting to be of even date with the bill, was received in evidence against the plaintiff to prove the terms on which the bill was drawn.

An act done with the knowledge of a person who would have a right to object to it may be presumed to be done by his licence. Thus, where an enclosure had been made from a waste twelve or fourteen years, and seen by the steward of the lord from time to time, without objection, it was left to the jury to say whether the inclosure was made by the lord's licence. *Doe d. Foley v. Wilson*, 11 East, 56. An entry in a merchant's book, purporting to be a copy of a letter addressed by him to his partner abroad, is evidence, as against the writer, that it was also sent. *Sturge v. Buchanan*, 10 Ad. & E. 598. So indorsements on a promissory note admitting the receipt of interest, are presumed (except for the purpose of rebutting the Statute of Limitations, *vide post*, p. 36) to have been made at the time they bear date. *Smith v. Batters*, 1 M. & Rob. 341. And a bill is presumed to be made on the day of its date. *Owen v. Waters*, 2 M. & W. 91; *Laws v. Rand*, 3 C. B., N. S. 442; 27 L. J., C. P. 76; except when used to prove a petitioning creditor's debt at the date specified; *Anderson v. Weston*, 6 N. C. 296, 301; but the soundness of this exception was questioned in *Potez v. Glossop*, *supra*. When the *bona fides* of a sale to the plaintiff by a bankrupt was disputed by the assignees, the plaintiff was allowed to use a receipt and delivery order for the goods, dated at the time of the alleged sale, but not delivered to the witness who produced them till after the sale and bankruptcy, as confirma-

tory evidence of the date of the sale. *Morgan v. Whitmore*, 6 Exch. 716; 20 L. J., Ex. 289. On the ground of danger of collusion, it was considered necessary to give extrinsic evidence of the date of letters put in to show the terms on which husband and wife were living, in an action for adultery. *Trelawney v. Colman*, 2 Stark. 193.

In many cases, though the fact of actual knowledge cannot be proved, it will be presumed. Thus, where the rules of a club are contained in a book openly kept by the proper officer or servant of the club, every member of the club must be presumed to be acquainted with them. *Raggett v. Musgrave*, 2 C. & P. 556; *Alderson v. Clay*, 1 Stark. 405; *Wiltzie v. Adamson*, 1 Phill. Ev. 252, 6th ed. A person dealing with a registered company is presumed to know the registered constitution of the company. *Balfour v. Ernest*, 5 C. B., N. S. 600; 28 L. J., C. P. 170.

It is not very easy to distinguish those presumptions which are obligatory on a jury from those which they are at liberty to disregard and to negative, even when not rebutted. Judges have entertained different opinions on this head as regards the effect of long user in proof of prescriptions and customs. On the one hand, the title to important rights can hardly be considered as secure, if no antiquity of enjoyment can prevent them from being exposed to the casualties of a verdict; on the other hand, it seems to be a contradiction in terms to leave to the jury presumptive evidence of a fact with no alternative but to find it. See the remarks in *Newcastle, Pilots of, v. Bradley*, 2 E. & B. 430-1, n.

It is not permitted to the parties to prove every fact which would lead to a presumption in some measure bearing on the question in issue. If there were no limits to this, it is obvious that a trial might be unduly lengthened; and it is clear that a judge may refuse to receive evidence which only leads to a very weak presumption. See *Proof of collateral facts*, post, pp. 80, 81.

Presumption of Payment.] If a landlord gives a receipt for the rent last due, it is presumable that all former rent has been paid. Gilb. Ev. 157. And payment from 1864 to 1877 by a tenant in common to his co-tenant of a moiety of the rent of the lands is said to be evidence of such payment prior to 1864. *Sanders v. Sanders*, 19 Ch. D. 373, C. A. Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it; *Gibbon v. Featherstonhaugh*, 1 Stark. 225; but not without proof of circulation after acceptance. *Pfiel v. Vanbatenberg*, 2 Camp. 439. Proof that the plaintiff and other workmen employed by the defendant came to him regularly every week to receive their wages from him, and that the plaintiff had not been heard to complain of non-payment, is presumptive evidence of payment of his past wages. *Lucas v. Norosilieski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 80. So where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money which she had received without any written voucher passing, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff. *Evans v. Birch*, 3 Camp. 10. So where goods have been consigned to a factor to sell on commission, it may be presumed, after a reasonable time [*e. g.* 14 years] that he has accounted. *Topham v. Braddick*, 1 Taunt. 572. A debt, whether by simple contract or specialty, may be presumed to be satisfied from mere lapse of time. Thus, a simple loan 13 years ago may be presumed to be repaid, where no evidence to the contrary is offered; *Cooper v. Turner*, 2 Stark. 497. A similar presumption was held to arise in the case of a promissory

note; *Duffield v. Creed*, 5 Esp. 52; see also *Brown v. Rutherford*, 14 Ch. D. 687, C. A.; this was, however, doubted by Abbott, C. J., in *Du Belloiz v. Waterpark*, 1 D. & Ry. 16. The production of a cheque drawn by the defendant on his banker, and payable to the plaintiff, with proof that plaintiff indorsed his name upon it, and that it had been paid, affords *prima facie* evidence of payment to him. *Egg v. Barnett*, 3 Esp. 196; *Bonwell v. Smith*, 6 C. & P. 60. So the drawing of a cheque by A. in favour of B., and payment of it to B., was held proof of payment by A. to B., without showing that A. gave it to B. *Mountford v. Harper*, 16 M. & W. 825; correcting the decision in *Lloyd v. Sandilands*, Gow, 16. The strength of evidence such as that in the cases last cited must necessarily vary with the character of the debt, the mode in which it has been contracted, the position of the parties, and other similar circumstances. As if the party producing the security were fellow-lodger or clerk to the original holder, or his near relation, or in any position where he might easily possess himself of the document. Where S. proved that he lent B. a cheque on his bankers for 100*l.*, and produced the cheque crossed with the names of B.'s bankers, and showed that 100*l.* had been paid to the account of B. the day after the cheque became due; but it appeared that the papers of B., after he became bankrupt, fell into the hands of S.: it was held that there was no presumption that the amount of the cheque had been paid to B. *Bleashy v. Crossley*, 3 Bing. 430. In an action by indorsee against acceptor, to which defendant pleaded payment, the plaintiff produced the bill on which a receipt was indorsed; proof was given that an unknown person had, after dishonour by the defendant, paid the amount to a holder, and taken it away with the receipt indorsed: held that this was no evidence of payment by the defendant. *Phillips v. Warren*, 14 M. & W. 379.

Although a limitation of actions on bonds, &c., is now provided for by stat. 3 & 4 Will. 4, c. 42, yet a reference to the cases under the former law will still be occasionally necessary or convenient. Payment of a bond is presumed after 20 years without demand made; *Oswald v. Legh*, 1 T. R. 270; *Bostock v. Hume*, 7 M. & G. 893; and even after the lapse of a less time, if other circumstances concur to fortify the presumption, as a settlement of accounts in the mean time. *S. C. Colsell v. Budd*, 1 Camp. 27. The presumption may be rebutted by circumstances, as by the defendant's admission of the debt, or by proof of payment of interest within 20 years. So by proof that the defendant has resided abroad during the whole of the time; *Newman v. Newman*, 1 Stark. 101; *Elliott v. Elliott*, 1 M. & Rob. 44; or was insolvent; *Fladong v. Winter*, 19 Ves. 196; see *Hull, Mayor of, v. Horner*, Cowp. 109, and 3 Man. & Ry. 118, n., where the origin of the doctrine of 20 years' presumption is discussed. But see *Willaume v. Gorges*, 1 Camp. 217, *contra*.

On the ground that they are against the obligee's interest, indorsements on a bond made by the deceased obligee, acknowledging the receipt of interest within 20 years, have been admitted to rebut the presumption of payment of principal, provided there be evidence that such indorsements existed before the presumption of payment arose. *Searle v. Barrington, Ltd.*, 2 Stra. 826; *Rose v. Bryant*, 2 Camp. 322; *Gleadow v. Atkin*, 1 Cr. & M. 421. But where the indorsement was made *after* the lapse of 20 years it was not admissible in evidence; *Turner v. Crisp*, cited 2 Stra. 827. Since *Ld. Tenterden's Act* (9 Geo. 4, c. 14), s. 3, indorsements of this kind are no longer sufficient to prevent the operation of the Statute of Limitations in the case of bills, notes, and other simple contracts within the provisions of that statute; but they may still be admissible for other purposes, as to rebut the presumption of payment of principal; and as the act of 9 Geo. 4 seems to contemplate only "writings" within the old Statute of Limita-

tions and no similar provision is contained in the stat. 3 & 4 Will. 4, c. 42. indorsements on *bonds* and *specialties* may still be available to exempt the debt from the operation of the statute, by constituting evidence of part payment under sect. 5 of the last act. If so, it may be a question whether notwithstanding the decisions mentioned under the last head respecting the presumption in favour of the dates which instruments *purport* to bear, some extrinsic evidence ought not to be given that the indorsements were really made at the date thereof, or at least *before* the time of limitation had lapsed. See the observations in 1 Taylor, Evid., §§ 623—629. The preponderance of authority is at present against the admission of such indorsements without extrinsic proof of the date. An indorsement, made within 20 years, of the payment of interest within 20 years, is sufficient to rebut the presumption, though the interest accrued beyond 20 years. *Sanders v. Meredith*, 3 M. & Ry. 116. An indorsement on a note, payable after demand, of the payment of interest is evidence of the note having become payable by a demand having been made. *Brown v. Rutherford*, 14 Ch. D. 687, C. A.

Presumption of Property.] Proof of the possession of land, or of the receipt of rent from the person in possession, is *prima facie* evidence of seisin in fee. See *post*, tit. *Action for recovery of land*. The owner of the fee-simple is presumed to have a right to the minerals; but that presumption may be rebutted by non-enjoyment, and by the user of persons not the owners of the soil. *Rowe v. Grenfel*, Ry. & M. 396; *Rowe v. Brenton*, 8 B. & C. 737. Payment of a small unvaried rent for a long series of years [*e.g.* 38] to the lord of a manor, raises the presumption that the rent is a quit rent, and not rent service. *Doe d. Whittick v. Johnson*, Gow, 173. *Sed qu.* see *Hardon v. Heskeith*, 4 H. & N. 175; 28 L. J., Ex. 137. But long-continued payment by one lord of a manor to another lord is not presumptive evidence that one manor was originally part of the other. *Anglesey, Ms., v. Hatherton, Ltd.*, 10 M. & W. 218. In ejectment for a mine, a former recovery in trover for lead dug out of it does not *per se* afford evidence of the plaintiff's then possession of the mine. B. N. P. 102. The owners of contiguous houses have no *presumed* right of mutual support. It must be claimed by actual or implied grant or reservation. 2 Roll. Ab. 564, l. 50; *Partridge v. Scott*, 3 M. & W. 220; and see *Angus v. Dalton*, *infra*. But it is otherwise in the case of the ownership of adjoining land in its natural state. Roll. Ab. *supra*, and cases cited in *Humphries v. Brogden*, *infra*. So where the surface and the subsoil are vested in different owners, the presumption is that the owner of the surface has a right to the support of the subsoil. *Humphries v. Brogden*, 12 Q. B. 739, and judgment. *Ibid.* As to the presumption of a right of lateral support for buildings, see *Angus v. Dalton*, 6 Ap. Ca. 740, D. P. See further *post*, tit. *Action for disturbance of right of support*. In all these cases the presumption may be displaced or reversed by proof of express covenants between the parties, or by implied obligations arising out of the original circumstances under which the property became divided. See *Richards v. Rose*, 9 Exch. 218; 23 L. J., Ex. 3.

For other cases of presumed ownership, or property, see further the heads *Action for nuisance*, *Trespass to land*, *post*.

Presumption of Grants, &c.] It is a rule of prescription that “antiquity of time justifies all titles and supposeth the best beginning the law can give them.” So that if evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in

pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory." *Johnson v. Barnes*, L. R., 7 C. P. 592, 604, *per cur.*; L. R., 8 C. P. 527, Ex. Ch. Thus, independently of the statute 2 & 3 Will. 4, c. 71, for shortening the time of prescription, evidence of the adverse enjoyment of an easement (as of lights or a way) for twenty years or upwards, unexplained, is held to afford a presumption of a grant or other lawful title to enjoy it. *Lewis v. Price*, 2 Wms. Saund. 175 a; *Campbell v. Wilson*, 3 East, 294; *Livett v. Wilson*, 2 Bing. 115, *post*, *Action for disturbance of way*. The uninterrupted possession of a pew for 36 years affords a presumption of title by faculty or otherwise. *Rogers v. Brooks*, cited 1 T. R. 431, n. So the use for over 40 years of a sign-board attached to an adjacent house is evidence of a grant of the easement to keep it there. *Moody v. Steggles*, 12 Ch. D. 261. Exclusive possession of a stream of water in any particular manner for 20 years is presumptive evidence of right in the party enjoying it derived from a grant, or, if need be, an act of parliament. *Bealey v. Shaw*, 6 East, 215. See *Mason v. Hill*, 5 B. & Ad. 1; *Magor v. Chadwick*, 11 Ad. & E. 571; *Ivimey v. Stocker*, L. R., 1 Ch. 396. So from 20 years' enjoyment the jury may presume a grant of the right of landing nets on another's ground to the owners of a fishery. *Gray v. Bond*, 2 B. & B. 667. When rights of common and estovers have been enjoyed for many years by the freehold tenants of a manor, and also by the inhabitants, the latter will be presumed to claim through the former, so as to have acquired a legal origin for the right. *Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 716. So where a borough corporation had by prescription a several oyster fishery in an estuary, and the free inhabitants of ancient tenements in the borough from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters without stint during a portion of the year, it was held that the right of the corporation must be presumed to have been granted to them subject to a trust or condition in favour of such inhabitants in accordance with the usage. *Saltash, Mayor of, v. Goodman*, 7 Ap. Ca. 633, D. P. In order, however, to establish the presumption of a grant of an easement, it must appear that the enjoyment was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant such right, except as against himself. *Bright v. Walker*, 1 C. M. & R. 219; *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. & A. 579. And in order to make the enjoyment evidence as against a reversioner, there must be evidence against him of acquiescence distinct from the mere enjoyment of the easement. But, if the easement existed previously to the commencement of the tenancy, the fact of the premises having been for a long time in the possession of a tenant will not defeat the presumption of a grant. *Cross v. Lewis*, 2 B. & C. 686; see *post*, *Action for disturbance of way*; *Proof of Public way*. As to presumption of a grant of lateral support for a building, see *Angus v. Dalton*, 4 Q. B. D. 162, C. A.; 6 Ap. Ca. 740, D. P. As to presumed grants and reservations of easements, see further *sub tit. Actions for obstruction of light and air, and for disturbance of watercourse, post*.

As a jury will be at liberty to negative a grant, unless some probable evidence of one is laid before them, the title by lost grant cannot always be relied on. See *Norfolk, Duke of, v. Arbuthnot*, 5 C. P. D. 390, 392. The stat. 2 & 3 Will. 4, c. 71, while on the one hand it confers a new title by uninterrupted enjoyments, and so dispenses with the necessity of presuming grants, on the other hand enacts (sect. 6), that in the cases therein provided for (that is, cases of easements and profits à prendre) no presumption shall be made in support of a claim on proof of enjoyment for a less period than the number of years specified in the act.

Charters and grants from the Crown may be presumed from length of

possession (as, for instance, 100 years) not merely in suits between private parties, but even against the Crown itself, if the Crown be capable of making the grant. *Hull, Mayor of, v. Horner*, Cowp. 102; *Jenkins v. Harvey*, 1 C. M. & R. 877. Even where there is no person competent to make an indefeasible grant, an act of parliament may be presumed in favour of very long user. *Lopez v. Andrew*, 3 M. & Ry. 329, n. But it has been said that "no judge would venture to direct a jury that they could affirm the passing of an act of parliament within the last 250 years, on an important subject of general interest, of which no vestige can be found on the parliament rolls or other records, or in the history of the country:" and the court accordingly refused to presume any act sanctioning a mode of nominating by the Crown to a deanery, which was shown to have begun in the 16th century, and to have continued, without interruption, for the last 250 years. *R. v. S. Peter's, Exeter*, 12 Ad. & E. 512; and see a like opinion expressed in *Att.-Gen. v. Evelme Hospital*, 17 Beav. 366; 22 L. J., Ch. 846. See also *Chilton v. Corporation of London*, 7 Ch. D. 735. See also cases of presumption arising from long possession mentioned *arguendo*, in *Tenny v. Jones*, 10 Bing. 78; *Doe d. Millett v. Millett*, 11 Q. B. 1036; *Lyon v. Reed*, 13 M. & W. 285. Where by an act of Will. 3 certain corporation land was set apart for a burial ground, which was afterwards consecrated; it was held that a conveyance of the land from the corporation might be presumed. *Campbell v. Liverpool, Mayor of*, L. R., 9 Eq. 579.

Where the origin of the possession is accounted for without the aid of a grant or conveyance, and it is consistent with the fact of there having been no conveyance, it requires stronger evidence than mere possession to warrant a jury in saying that any conveyance has been executed. *Doe d. Fenwick v. Reed*, 5 B. & A. 232. And user of land is evidence of a grant thereof, only where the user would otherwise be illegal; where the user is referable to an existing easement there is no presumption of such grant. *Lee Conservancy Board v. Button*, 12 Ch. D. 383, 406, 409, C. A.; 6 Ap. Ca. 685, D. P. Where there is no evidence of the right to an easement, except *mere user*, without any trace of the commencement of it, it is evidence of a title by prescription rather than by grant. *Blewett v. Tregonning*, 3 Ad. & E. 554. A Crown grant of a *profit à prendre* to the inhabitants of a parish, thereby incorporating them, will not be presumed if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed. *Rivers, Ltd., v. Adams*, 3 Ex. D. 361; *Saltsash, Mayor of, v. Goodman*, 7 Ap. Ca. 633, 637. And it seems that a jury ought not to be encouraged to presume a Crown grant from mere user in favour of a party, who might, if he pleased, have produced an authentic enrolment of it, which was shown by his own witnesses to be in existence at the Tower. *Brune v. Thompson*, 4 Q. B. 543. Where the plaintiff claimed, on an *indebitatus* count, a toll by prescription, and proved constant perception of a fixed amount, which the jury found to be unreasonable; held, that the plaintiff was not entitled to recover at all, although the jury found what amount would have been reasonable. S. C. As to presumption of fees, tolls, &c., being payable from long-continued payment of them, see the following cases—*Shephard v. Payne*, 12 C. B., N. S. 433; 31 L. J., C. P. 297; 16 C. B., N. S. 132; 33 L. J., C. P. 158; *Bryant v. Foot*, L. R. 2 Q. B. 16; L. R., 3 Q. B. 497, Ex. Ch.; *Lawrence v. Hitch*, *Id.* 521, Ex. Ch.; *Mills v. Mayor of Colchester*, L. R., 2 C. P. 476; L. R., 3 C. P. 575; *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192; 35 L. J., C. P. 29; *Free Fishers of Whitstable v. Foreman*, L. R., 4 H. L. 266.

Mere possession of a lease by the lessor, with the seals cut off, affords no presumption of a surrender in writing under the Stat. of Frauds. *Doe d. Courtaul v. Thomas*, 9 B. & C. 288.

Presumption of the duration of life and survivorship.] The presumption of the duration of life of persons of whom no account can be given, generally ends at the expiration of 7 years from the time when they were last known to be living. *Per* Ld. Ellenborough, C.J., *Doe d. George v. Jesson*, 6 East, 84; *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. By stat. 19 Car. 2, c. 11, s. 1, in action by lessor or reversioner for the recovery of lands granted or leased for lives, or for years determinable on lives, the *cestuis que vie* shall be accounted to be naturally dead if they shall remain beyond the seas, or elsewhere absent themselves within the realm, by the space of 7 years together, and no sufficient or evident proof be made of the lives of such persons: sect. 4 provides for the recovery of the land and mesne profits where the *cestuis que vie* are afterwards shown to have been living. At common law, proof by one of a family, that, many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe d. Banning v. Griffin*, 15 East, 293. So where a person is shown to have been in existence a long time ago, as 100 years, his death unmarried and without issue will be presumed in the absence of any evidence to the contrary. *Doe d. Oldham v. Wolley*, 8 B. & C. 22; *Greaves v. Greenwood*, 2 Ex. D. 289, C. A. But in shorter periods (as 50 years) inquiry must be made in proper quarters, and from persons likely to know, whether the missing party A. has been heard of. *Doe d. France v. Andrews*, 15 Q. B. 756. If those persons say that they have heard of A., the *onus* of proof is shifted, but the party seeking to prove A.'s death may then give evidence to show that their only information is erroneous. *Edmonds v. Prudential Assur. Co.*, 2 Ap. Ca. 487, 511, 514, *per* Ld. Blackburn. Proof that a person sailed in a ship bound for the West Indies, 2 or 3 years ago, and that the ship has not since been heard of, is presumptive evidence that the person is dead; but the precise time of the death, if material, must depend upon the circumstances of the case. *Watson v. King*, 1 Stark. 121. See also *Doe d. Ld. Ashburnham v. Michael*, 17 Q. B. 276; 20 L. J., Q. B. 480, cited *post*, p. 56.

The fact of the party being alive or dead at any particular period within, or at the end of, the 7 years must be proved by the party asserting that fact. *Doe d. Knight v. Nepean*, 5 B. & Ad. 86; 2 M. & W. 894, Ex. Ch.; *In re Phen's Trusts*, *post*, p. 41. In a case where a girl of 16 ran away from her father, a small farmer, and was never heard of after 1814, when she left England, Shadwell, V.-C., refused to presume in 1844, that she had died in 1821; the mere fact of her not having been heard of since 1814 afforded no inference of her death; for the circumstances of her case made it probable that she would never be heard of by her relations. *Watson v. England*, 14 Sim. 28; *Dowley v. Winfield*, *Id.* 277; *Bowden v. Henderson*, 2 Sm. & Giff. 360. In the cases of *In re Beasme's Trusts*, L. R. 7 Eq. 498, and *In re Henderson's Trusts*, cited *Id.* 499, it was held that where a person had not applied for the payment of an annuity which he had previously received, and on which he was dependent for his support, there was evidence of his death before the payment became due. See also *Hickman v. Upsall*, L. R. 20 Eq. 136; 4 Ch. D. 144.

Presumptions as to the continuance of life are not *legal* presumptions, but presumptions of fact only, depending on the circumstances of each case. *Lapsley v. Grierson*, 1 H. L. C. 498; *R. v. Lumley*, L. R., 1 C. C. 196; *R. v. Willshire*, 6 Q. B. D. 366. Where N., born in 1829, went to America in 1853, and frequently wrote home till August, 1858, when he wrote from on board an American war-ship, but from that time nothing was heard about

him except that he was entered in the books of the American navy as having deserted on the 16th June, 1860, while on leave, Giffard, L. J., refused to presume that N. was alive on the 6th Jan., 1861. *In re Phen's Trusts*, L. R., 5 Ch. 139; *accord. In re Lewes' Trusts*, L. R., 6 Ch. 356. See also *In re Walker*, L. R., 7 Ch. 120.

Where a husband and wife had been carried off the deck of a vessel by the same wave, it was held that there was no inference of law as to survivorship from the different sex, age, and state of health of the husband and wife; that the question was, from beginning to end, one of fact; and the difference in strength, age, and in other respects, was merely matter of evidence for the jury. *Underwood v. Wing*, 23 L. J., Ch. 982; 4 D. M. & G. 633; 24 L. J., Ch. 293; *affirm. in Wing v. Angrave*, 8 H. L. C. 183; 30 L. J., Ch. 65; *Re Green's Settlement*, L. R., 1 Eq. 289.

See further, 1 Dart's Vendors and Purchasers, 5th ed., pp. 340—344, where all the cases on these subjects are collected.

A presumption which juries ought to make is, that males under 14 are incapable of sexual intercourse. The period of gestation is also presumed to be about 9 calendar months. The exact limits of variation of this period are not very clearly settled; so that if there were any circumstances from which an unusually short or long period of gestation might be inferred, or if it were necessary to ascertain the period with nicety, special medical testimony would be required. The subject was elaborately discussed in the *Gardiner Peerage case*, which is reported separately by Le Marchant. In ordinary cases juries would be directed that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.

Presumption in favour of the regularity of acts, appointments, &c.] The legal maxim here applicable is *omnia presumuntur rite et solenniter esse acta*. Where a feoffment has been proved, livery of seisin may be presumed after 20 years, if possession has gone along with the feoffment; *Biden v. Loveday*, cited 1 Vern. 196; *Rees v. Lloyd*, Wightw. 123; but a less time than 20 years is not sufficient; *Doe d. Wilkins v. Cleveland, M. of*, 9 B. & C. 864; except as against one who claims under it. *Doe d. Rowlandson v. Wainwright*, 5 Ad. & E. 520. As to a presumption of the regularity of acts done after a lapse of time without impeachment of them, see the observations of the court in *Williams v. Eytton*, 2 H. & N. 771; 27 L. J., Ex. 176; S. C. on error, 4 H. & N. 357; 28 L. J., Ex. 146. A person will not be presumed to have committed an unlawful act; therefore, when performances appeared to have taken place at a theatre, a licence was presumed in an action against a performer for not acting. *Rodwell v. Redge*, 1 C. & P. 220. But where the act requiring the licence directs that a notice of it shall be painted on the outside of the house, and there is no such notice, it will be presumed, in an action for the penalty, that there is no licence. *Gregory v. Tuffs*, 6 C. & P. 271. Generally it may be laid down that illegality is not presumed; *per Bayley, B.*, in *Gleadow v. Atkin*, 1 Cr. & M. 418; at least in a suit *inter alios*, or any collateral proceeding. See *Onus Probandi*, *post*, p. 89. So, a fact may be presumed from the regular course of a public office; thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been endorsement on a licence, it was held (the licence being lost) that from this entry the endorsement might be presumed. *Butler v. Allnut*, 1 Stark. 222. So when a statute enjoins a public officer to make an entry of registration of a deed when brought to him with an affidavit of certain particulars, it must be presumed from such entry being made, that the affidavit was left with the deed, as required by the statute; *Waddington v. Roberts*, L. R., 3 Q. B.

579; the deed in this case was a composition deed under the Bankruptcy Act, 1861, s. 192, and the court followed *Grindell v. Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333, where the deed was a bill of sale; *Gugen v. Sampson*, 4 F. & F. 974, 976, *cor.* Channell, B., is to the like effect. In *Mason v. Wood*, 1 C. P. D. 63, the court declined to follow these cases, on the ground apparently that the statute did not direct the officer not to file the bill of sale without the affidavit. In the case of the post-office, there is a presumption that a letter properly directed and posted will be delivered in due course; see *British & American Telegraph Co. v. Colson*, L. R., 6 Ex. 122, *per* Bramwell, B.; and *Stocken v. Collin*, 7 M. & W. 515. This presumption is, it would seem, to be extended to postal telegrams, now that the inland telegraphs form part of the Government postal system.

The most common application of this presumption is in favour of the regular appointment of an officer in the execution of his duty. Thus, the fact of a person acting in an official capacity as a surrogate, is *prima facie* evidence that he is duly appointed, and has competent authority. *R. v. Verelst*, 3 Camp. 432. So of other public officers; though the appointment must be in writing; as in the case of justices of the peace, constables, &c. *Berryman v. Wise*, 4 T. R. 366; *Doe d. Davy v. Haddon*, 3 Dougl. 310; *Marshall v. Lamb*, 5 Q. B. 115. So, where a soldier is employed in recruiting, it will be presumed that he is duly "attested soldier" within the Mutiny Act. *Wotton v. Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73. See also *R. v. Hawkins*, 10 East, 211. So in the case of a constable appointed by commissioners under a local act. *Butler v. Ford*, 1 Cr. & M. 662. And the fact is evidence even in his own favour. S. C. So, where it is necessary to prove the swearing of an affidavit before a commissioner of one of the superior courts, evidence of his acting as such is sufficient. *R. v. Howard*, 1 M. & Rob. 187. Similar proof of a party's appointment as vestry clerk, *M'Gahey v. Alston*, 2 M. & W. 206; as solicitor, *Berryman v. Wise*, *supra*; as overseer, *Cannell v. Curtis*, 2 N. C. 228; *Doe d. Bowley v. Baines*, 8 Q. B. 1037; or as incumbent of a living, *Radford v. M'Intosh*, 3 T. R. 635;—has been held sufficient. But in all these cases the evidence is only presumptive, and may be rebutted, when the regularity of the appointment is a pertinent inquiry.

As to presumption that an instrument lost, or not produced on notice, is or is not duly stamped, see *post*, tit. *Stamps—Effect of want of stamp; Stamp, when presumed.*

HEARSAY.

It is a general rule of evidence that declarations of persons not made upon oath are inadmissible evidence of the fact declared. *Spargo v. Brown*, 9 B. & C. 938. Unless it be by way of *admission* by a party to the suit. Therefore, hearsay evidence, which is the mere repetition of such declarations upon the oath of a witness who heard them, is excluded. There are, however, certain classes of cases in which hearsay is on various grounds admissible.

Hearsay admissible in questions of Pedigree.] In questions of pedigree, the oral or written declarations of deceased members of the family are admissible to prove a pedigree. And this exception is founded on the obvious difficulty of tracing descent and the relationship of deceased members of families by any other evidence. Thus, declarations of deceased parents are admissible to prove the legitimacy of their children. So, hearsay is good evidence to prove who is a person's grandfather; when he married; what children he had; or the death of a relation beyond sea, &c. B. N. P. 294-5; *Bridger v. Huett*, 2 F. & F. 35. The declarations of a deceased

parent and another relation were admitted to show which of several children born at a birth, was the eldest. *Per Reynolds*, C. B., 12 Vin. Abr. 247; cited 4 Camp. 410. Declarations in a family, descriptions in wills, inscriptions upon monuments, in bibles or other books, and in registry books, are all admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position, without any temptation to exceed or fall short of it. *Per Lord Eldon, Whitelocke v. Baker*, 13 Ves. 514; *Higham v. Ridgway*, 10 East, 109; *Berkeley Peerage case*, 4 Camp. 418. And see the *Slane Peerage case*, 5 Cl. & Fin. 23; and the *Vaux Peerage, Ib.* 526. Entries in a family bible are admissible in evidence, on the ground that being in that place they are to be taken as assented to by those having the custody of the book; proof of the handwriting of the entries is therefore immaterial. *Hubbard v. Lees*, L. R., 1 Ex. 255. See also *Berkeley Peerage case*, 4 Camp. 421; *per* Lords Ellenborough and Redesdale. It seems, however, that in the case of any other book the entries must be proved to have been made by a member of the family; *Tracy Peerage*, Hubback, Evid. of Succession, 673; or that they have been treated by a relative as a correct family memorial. *Hood v. Beauchamp*, 8 Sim. 26. A pedigree which has long hung up in a family mansion is good evidence in such cases; *Goodright d. Stevens v. Moss*, 2 Cowp. 594; or a marriage certificate kept by the family; *Doe d. Jenkins v. Davies*, 10 Q. B. 314. A minute-book of a visitation, signed by the heads of the family, has been admitted, though produced from a private library. *Pitton v. Walker*, 1 Stra. 162. A signed pedigree delivered to the Heralds' College by virtue of a commission under which the college was authorised to receive and enrol such pedigrees was admitted. *Shrewsbury Peerage case*, 7 H. L. C. 19. So, a paper in the handwriting of a deceased member of the family, purporting to give a genealogical account of the family, was held admissible, though never made public by the writer, erroneous in many particulars, and professing to be founded partly on hearsay. *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 147. So, a ring, worn publicly, stating the date of the person's death whose name is engraved upon it. *S. C., Id.* 162. So, a description of a party as "daughter and heir," in a deed signed by the party so described. *Doe d. Jenkins v. Davies, supra*; *Smith v. Tebbitt*, L. R., 1 P. & M. 354. But an old pedigree, professing on the face of it to be compiled from "registers, wills, monumental inscriptions, family records, and history," and going back to a fabulous date, is not evidence, though proved to be signed by members of the family, except so far as it relates to persons presumably known to them, or respecting whom they may have obtained information from other members of the family; whether the mere recognition of a pedigree by a deceased ancestor will make it legitimate evidence (except against claimants under him) is doubtful. *Davies v. Lowndes*, 5 N. C. 161; 6 M. & Gr. 471, 512, 525, &c., Ex. Ch. The ground upon which the inscription on a tombstone, or a tablet in a church, is admitted is that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence; *Id.* 512, *per* Parke, B.

The memoranda of a parent are good evidence to prove the time of the birth of a child. *Herbert v. Tuckal*, T. Raym. 84, cited by Lord Ellenborough in *Roe d. Brune v. Rawlings*, 7 East, 290. But the declaration of a father as to the place of birth of a son was considered inadmissible, as being a mere question of locality, and not of pedigree, in *R. v. Erith*, 8 East, 542. So, in *Shields v. Boucher*, 1 De G. & Sm. 40, Wilde, C. J., rejected, upon the trial of an issue, declarations of a relation as to the part of England from which he had originally come; but on moving for a new trial, Knight-

Bruce, V.-C., expressed a strong opinion in favour of their admissibility in a case of mere genealogy, and with a view to identify ancestors, and distinguished *R. v. Erith*, *ante*, p. 43. *Accord. per* Kindersley, V.-C., in *Bauer v. Mitford*, 7 W. R. 570, June, 1859; and declarations of a party, showing that he has or had relations living at A., have been admitted to identify persons whose existence is proved *aliunde*. *Rishton v. Nesbitt*, 2 M. & Rob. 554; *Hood v. Beauchamp*, Hubback, Evid. of Succession, 468, cited 1 Tayl. Evid., § 582. The declarations of a party as to *his own* illegitimacy, or place of birth, seem inadmissible except against himself, or those claiming under him by title posterior to the declaration. *R. v. Rishworth*, 2 Q. B. 476.

Where statements contained in monumental inscriptions, and declarations made by a deceased relation, were offered in evidence upon the trial of an issue out of Chancery to prove the *ages* of the parties referred to, Tindal, C. J., rejected the evidence; but Lord Brougham, C., after argument, expressed a very strong opinion in favour of it; and afterwards stated that he had the concurring opinions of Littledale, J., and Parke, J.; but, the suit being compromised, no further opinion was delivered. *Kidney v. Cockburn*, 2 Russ. & Myl. 167. An inscription on a tombstone, stating the death of a party at the age of 90, was admitted as evidence of the age. *Rider v. Malbone*, *cor.* Littledale, J., cited *Id.* pp. 169, 170. For other cases in which inscriptions on monuments have been admitted in proof of pedigree, see 1 Taylor, Evidence, § 587, and *Shrewsbury Peerage*, 7 H. L. C. 1. So, an old tracing from an effaced monument has been admitted. *Slaney v. Wade*, 7 Sim. 595. A bill in Chancery by a father, stating his pedigree, was admitted in *Taylor v. Cole*, 7 T. R. 3, n.; but this is contrary to the resolution of the judges in the *Banbury Peerage case*, 2 Selw. N. P., 2nd ed. 773, and to *Boileau v. Rutlin*, 2 Exch. 678. An answer in Chancery, sworn *ante litem motam*, seems unexceptionable as evidence of pedigree incidentally set forth in it; but in the *Wharton Peerage case*, 12 Cl. & Fin. 295, an answer, sworn but not filed, was rejected as evidence of pedigree. The recital in a family conveyance by a trustee, is evidence of parentage. *Slaney v. Wade*, *supra*. So an old and cancelled will has been allowed as evidence of the existence and relative ages of certain deceased members of the family from whom both parties derived title. *Doe d. Johnson v. Pembroke*, *Earl of*, 11 East, 504. The probate of a will is not *primary* evidence for this purpose. *Doe d. Wild v. Ormerod*, 1 M. & Rob. 466; *Dike v. Polhill*, 1 Ld. Raym. 744. The will itself and signature of the testator must be proved, unless the age of the document or other circumstances dispense with such proof; it is said, however, that the "ledger book" or "original rolls" of the Ecclesiastical Court, containing an enrolment of the will, are admissible evidence to prove relationship. B. N. P. 246.

It is not necessary that the declarations should be contemporaneous with the facts declared; thus, a person's declaration, that his grandmother's maiden name was A. B. is admissible. *Per* Ld. Brougham, C., *Monkton v. Att.-Gen.* 2 Russ. & Myl. 158. Nor is it necessary that the fact declared should be in the personal knowledge of the declarant; thus, the declaration of A. as to what he heard from B. is admissible, if both be relations. S. C. *Id.* 165.

Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property. In proving recent events, such as the place of birth, age, death, &c., of a person, where that fact is directly in issue, stricter proof may be reasonably required. The poor law cases, such as *R. v. Erith*, &c., *ante*, p. 43, are for this reason not cogent authorities in cases of pedigree. In peerage cases, also, unusually strict evidence is exacted.

General reputation is good evidence in pedigree cases, *e. g.*, of heirship;

Bridger v. Huett, 2 F. & F. 35; of marriage, *Evans v. Morgan*, 2 C. & J. 453; *Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J., P. M. & A. 217; *Campbell v. Campbell*, L. R., 1 H. L. Sc. 201, *per* Ld. Cranworth; but if it appears on cross-examination or otherwise that the witness is speaking of evidence given him by some individual, even as to general reputation, the evidence ceases to be admissible. *Shedden v. Patrick*, *supra*.

[*Hearsay, of what persons, admissible in questions of pedigree.*] The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and are not mistaken. *Per* Lord Eldon, C., *Whitelocke v. Baker*, 13 Ves. 514. Declarations by a deceased person as to her own legitimacy are evidence. *Procur.-Gen. v. Williams*, 31 L. J., P. M. & A. 157. So by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence. *Voules v. Young*, 13 Ves. 148; *Doe d. Northey v. Harvey*, Ry. & M. 297. So the declaration of a wife as to her husband's family. *Shrewsbury Peerage*, 7 H. L. C. 1. But not the declarations of her father. S. C. Nor the declarations of illegitimate relations. *Doe d. Bamford v. Barton*, 2 M. & Rob. 28; *Crispin v. Dogherty*, 3 Sw. & Tr. 44; 32 L. J., P. M. & A. 109. The declarations of servants and intimate acquaintance are not admissible. *Johnson v. Lawson*, 2 Bing. 86; S. C., 9 B. Moore, 183. The declarations of a deceased person, as to the fact of his own marriage, are evidence. B. N. P. 112; *R. v. Bramley*, 6 T. R. 330. The declarations of a deceased mother as to the non-access of her husband, are not evidence; on grounds of policy. *R. v. Luffe*, 8 East, 193; *Goodright d. Stevens v. Moss*, Cowp. 594. But where the non-access is admitted or established, her declarations may be proof of paternity. *Legge v. Edmonds*, 25 L. J., Ch. 125. See further *post*, *Action for recovery of land by heir-at-law*; *Defence*; *Proof of illegitimacy*. Before any such declaration can be admitted in evidence the relationship of the declarant by blood or marriage must be established by some proof independent of the declaration itself; it is the duty of the judge to decide whether this relationship is proved; slight evidence will, however, be sufficient; *Plant v. Taylor*, 7 H. & N. 237; 31 L. J., Ex. 289; *Smith v. Tebbitt*, L. R., 1 P. & M. 354.

Old depositions in a suit, purporting on the face of them to be made by relations, but not proved *aliunde* to have been so made, were not held evidence in the *Banbury Peerage case*, 2 Selw. N. P. 2nd ed. 773; *Accord. Davies v. Morgan*, 1 C. & J. 591; but see *Freeman v. Philipps*, 4 M. & S. 486, cited *post*, p. 49, where the antiquity of the depositions was held to dispense with such extrinsic proof. Although it is necessary to give evidence *dehors* to connect the persons making them with the family, yet where the question is whether A. be related to C., the declarations of B., who is proved to have been related to A., are evidence to prove C. related to A., without evidence *dehors* to show B. related to C. *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 156. When the judge has decided that the evidence is sufficient, he may receive the declaration, although the fact of relationship is the very point in issue in the cause; *Doe d. Jenkins v. Davies*, 10 Q. B. 314; and he is not bound to hear evidence on the *voir dire* to rebut the evidence of relationship. *Hitchins v. Eardley*, L. R., 2 P. & M. 248. It is no objection that the person who made the declaration stood *in pari casu* with the person tendering it in evidence; *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 159. In a claim of peerage a widow was admitted to prove declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish. Cited by Abbott, C. J., in *Doe d. Tilman v. Tarver*, Ry. & M. 141. So declarations

are admissible, though they tend to show the declarant's own title at the time, provided there was then no *lis mota*. S. C.; *Doe d. Jenkins v. Davies*, ante, p. 45; but in *Plant v. Taylor*, ante, p. 45, it was doubted whether a declaration by a person obviously in his own interest ought to be received. A deposition of a deceased relative taken on a commission of inquiry as to the next of kin of a lunatic, is admissible to establish the title of the lunatic's heir at law. *Gee v. Ward*, 7 E. & B. 509.

The relative, whose declarations are offered, must be proved to be dead, before they can be admitted in evidence. *Butler v. Mountgarret*, *Vt.*, 7 H. L. C. 633. Unless, indeed, from the circumstances, his death may be presumed, *vide ante*, p. 40.

Hearsay in questions of pedigree post litem motam.] If the declarations were made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage*, 4 Camp. 401. It is not necessary, in order to exclude the evidence, to show that the controversy was known to the person making the declaration. *Ib.* 417; *Reilly v. Fitzgerald*, 6 Ir. Eq. Rep. 348; *Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J., P. M. & A. 217. The declaration may be admissible though made from interested motives, and in order to prevent future controversy. *Berkeley Peerage*, 4 Camp. 418. The term *controversy* must not be understood as necessarily signifying an *existing suit*. *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 161; *Butler v. Mountgarret*, *Vt.*, *supra*; *Frederick v. Att.-Gen.*, L. R., 3 P. & M. 270. Nor a suit for the same purpose as the suit or proceeding in which the evidence is offered. *Berkeley Peerage*, *supra*; *Sussex Peerage*, 11 Cl. & Fin. 85; see *Shrewsbury Peerage*, 7 H. L. C. 1; and *Davies v. Lowndes*, 6 M. & Gr. 471, Ex. Ch.

Hearsay admissible to prove public rights.] Another exception to the rule which excludes hearsay evidence is where the question relates to matters of public or general interest. The term "interest" here means pecuniary interest, or some interest by which the legal rights or liabilities of a class of the community are affected; and the grounds of admissibility are,—because the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof;—because in local matters all persons living in the neighbourhood, and interested in them, are likely to be conversant with them;—because common rights are naturally the subject of common and public conversation, in the course of which, statements are made, which uncontradicted, are likely to be true; and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other, and interested in investigating the truth. *Per* Ld. Campbell, in *R. v. Bedfordshire*, 4 E. & B. 541-2; 24 L. J., Q. B. 81. It will be seen from the following illustrations of the rule that *all* the grounds above enumerated need not exist in order to justify the reception of hearsay; and that, in some instances, other grounds may be adduced in favour of it.

Common reputation is admissible to prove not only public or general rights (*Berkeley Peerage*, 4 Camp. 415; *Weeks v. Sparke*, 1 M. & S. 686; *Morewood v. Wood*, 14 East, 329); but also rights affecting a number of persons, and therefore in the nature of public rights, as a manorial custom; *Denn d. Goodwin v. Spray*, 1 T. R. 466; or the extent of a manor; *Doe d. Padwick v. Skinner*, 3 Exch. 84; or a reputed manor which once existed; *Doe d. Molesworth v. Sleeman*, 9 Q. B. 298; or common by cause of vicinage; *Pritchard v. Powell*, 10 Q. B. 589; or a custom in a borough to exclude foreigners; *semb.* *Davies v. Morgan*, 1 C. & J. 587; or the boundaries between parishes or manors; *Nicholls v. Parker*, 14 East, 331, n.; a parish modus; *Weeks v. Sparke*, 1 M. & S. 691; *White v. Lisle*, 4 Madd.

215; or parochial chapelry; *Carr v. Mostyn*, 5 Exch. 69; a toll traverse; *Brett v. Beales*, M. & M. 416; a ferry; *Pim v. Curell*, 6 M. & W. 234; a county bridge; *R. v. Bedfordshire*, 4 E. & B. 535; 24 L. J., Q. B. 81; a several fishery; *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P.; or a right of freewarren by prescription over an entire manor, including demesne and tenemental lands; *Carnarvon, El. of, v. Villebois*, 13 M. & W. 313. Therefore the declaration of deceased copyholders; or a saving of the right in a private act for inclosure, *inter alia*, of copyholders' common rights; or a verdict and judgment against a copyholder, are all evidence of such a right of freewarren. S. C., *Id.* A deed between the lord and certain copyholders, ratifying customs claimed by the latter in consideration of a payment to the lord, is evidence as against other copyholders where they set up a general custom negatived by the deed. *Semb. Anglesey, Ms. of, v. Hatherton, Ld.*, 10 M. & W. 218. A customary heriot payable by a freeholder of a manor, may be proved by presentments and payments of heriots by other freeholders of the manor. *Damerell v. Protheroe*, 10 Q. B. 20. Reputation is admissible to prove the prescriptive liability of certain landowners to repair a county bridge; for it is a matter of public interest, though private interests are also involved. *R. v. Bedfordshire*, *supra*; overruling *R. v. Wavertree*, 2 M. & Rob. 353.

But to prove a prescriptive right, strictly private, such evidence is not admissible; *Morewood v. Wood*, 14 East, 327; *Richards v. Bassett*, 10 B. & C. 663; and *Weeks v. Sparke*, 1 M. & S. 687, where it was allowed in support of a claim of a prescriptive right for the plaintiff, owner of a certain estate, to abridge by tillage the rights of common appurtenant claimed by the defendant and many others, is overruled by *Dunraven, El. of, v. Llewellyn*, 15 Q. B. 791; 19 L. J., Q. B. 388, Ex. Ch.; and see *Pritchard v. Powell*, *supra*. So, reputation as to the exemption of the sheriff of a county from the performance of a public duty, viz., the execution of criminals, was rejected in *R. v. Antrobus*, 2 Ad. & E. 793. But where the boundary of a tenement and a hamlet are proved to coincide, then evidence of reputation as to the bounds of the latter is legitimate evidence of the former. *Thomas v. Jenkins*, 6 Ad. & E. 525.

On a question whether a certain road was a highway, a copperplate map was produced, in which it was so described; it purported to have been taken by the direction of the churchwardens, and proof was offered that it was generally received in the parish as an authentic map; but Lord Kenyon rejected the evidence. *Pollard v. Scott*, Peake, 18. So the production of an old printed map of a county from the custody of a county magistrate, who had it some years in his possession, does not make it admissible to prove the bounds of the county. *Hammond v. Bradstreet*, 10 Exch. 390; 23 L. J., Ex. 332, Ex. Ch. It should seem, however, that if such a map had been supported by proof of its compilation by persons having particular means of knowledge of the bounds, or had been in some way sanctioned publicly as authentic, it might have been admissible as reputation; otherwise there is no reason for attaching more value to an engraved map than to a printed book as evidence of its contents; nor does the current use of it by those who reside in the district delineated in it imply an assent to all its details. The tithe commission maps are not, under 6 & 7 Will. 4, c. 71, s. 64, evidence as to the boundary of land in the case of disputed title. *Wilberforce v. Hearfield*, 5 Ch. D. 709. An old map commonly used at a manor court to define the limits of copyholds, is not evidence of a highway, though ways may be indicated upon it; especially if it does not purport to describe them as public ways. *Pipe v. Fulcher*, 1 E. & E. 111; 28 L. J., Q. B. 12.

A public meeting called for the purpose of considering about repairing a way, at which several present signed a paper stating that it was not a public

way, is evidence, though slight, against the right. *Barraclough v. Johnson*, 8 Ad. & E. 99. Even where general reputation is evidence, yet the tradition of a particular fact is not; as that a house once stood in a particular spot. *Ireland v. Powell*, Peake, Evid. 15. Nor is reputation admissible evidence of a farm modus. *Pritchett v. Honyborne*, 1 Y. & J. 135. Where a question of public way was in issue, the declarations of a deceased occupier of land made whilst planting a tree, stating that he planted it to show the boundary of the road, are not evidence of the public right, for it is not a statement of general reputation but of a particular fact. *R. v. Bliss*, 7 Ad. & E. 550. The declarations of a deceased lord of the manor as to the extent of the waste are not evidence in extension of it. *Crease v. Barrett*, 1 C. M. & R. 919. Where the question was, whether a place was within the limits of a hundred, ancient entries of orders of justices in sessions, stating the place to be within such limits, were held to be evidence of reputation, though the justices were not proved to have been resident within the hundred or county. *Newcastle, Dk. of, v. Broxtowe*, 4 B. & Ad. 273. So the question being whether certain land is in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence that the land is in that parish. *Plaxton v. Dare*, 10 B. & C. 17. In assumption for tolls by a lessee of the corporation of Cambridge, an old deed of composition between it and the University, recognising the right, was admitted in behalf of the plaintiff, though not proved to have been acted upon. *Brett v. Beales*, M. & M. 416. *Aliter* of a mere award, not proved to have been acquiesced in. S. C. So an award *inter alios* is not evidence, as reputation, of the boundary of a parish and county. *Evans v. Rees*, 10 Ad. & E. 151; *Wenman v. Mackenzie*, 5 E. & B. 447. The finding of a jury, under a commission duly issued out of the duchy court of Lancaster on the petition of the parties to ascertain the bounds of adjoining manors, is evidence of such bounds. *Brisco v. Lomax*, 8 Ad. & E. 198. But an interlocutory order of the same court, containing only a provisional arrangement between the parties, is not evidence of reputation. *Pim v. Curell*, 6 M. & W. 234. Generally, a verdict, and judgment thereon, in a matter in which reputation is admissible evidence, is also admissible; so of a decree, or inquest of office lawfully authorised. See *post*, *Effect of documentary evidence*. Reputation alone is said to be evidence of the existence of a manor. *Steel v. Prickett*, 2 Stark. 463; but it seems that some foundation should be laid by proof of acts done, as holding courts, &c.; and the production of a deputation to kill game is not of itself sufficient proof even of a colourable title to a real manor; *Rushworth v. Craven*, McCl. & Y. 417; for the lord of a mere reputed manor may grant one.

The rule with regard to the practice from whom the declarations proceed has been thus laid down: In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons (as in questions with respect to boundaries and customs of particular districts), it seems that hearsay evidence is not admissible, unless it be derived from persons conversant with the neighbourhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly public (a claim of highway, for instance), in which all the king's subjects are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Per Parke, B.*, in *Crease v. Barrett*, 1 C. M. & R. 919; *Doe d. Molesworth v. Sleeman*, 9 Q. B. 301, *per cur.* Thus, a document purporting to be a decree of certain persons, the Lord Treasurer

and Chancellor of the Exchequer, &c., who had no authority as a court, was held to be inadmissible evidence as reputation on a question whether the city of Chester, before it was made a county itself, formed a part of the county palatinate, because those personages had from their situations no peculiar knowledge of the facts. *Rogers v. Wood*, 2 B. & Ad. 245. So the answers of the tenants of a manor to an old commission of survey issued by the lord, finding the bounds of a manor and his right to wreck, are evidence of the former, but not of the latter, they having no peculiar means of knowledge, and the lord's title to such a franchise not being a matter of public concern. *Talbot v. Lewis*, 1 C. M. & R. 495. Such a claim of wreck is one affecting only the interest of the Crown, and not the tenants; and the case differs in that respect from a right of freewarren in *Carnarvon, El. of, v. Villebois*, 13 M. & W. 313.

Ancient answers of the customary tenants of a manor, stating the rights of the lord of the manor to all mines within it, are evidence even against the freeholders, for this claim affects all the tenants. *Crease v. Barrett*, *ante*, p. 48. As to the admissibility of inquisitions and surveys, as evidence of reputation, see *post*, *Effect of Inquisitions, &c.* Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, though they were parishioners and claimed right of common on the wastes which their declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 East, 331; *Plaxton v. Dare*, 10 B. & C. 19. See also *R. v. Mytton*, 2 E. & E. 557; *S. C. sub. nom. Mytton v. Thornbury*, 29 L. J., M. C. 109, *post*, p. 97. So, declarations on a question of parochial modus were received, though the deceased was a parishioner, and liable to pay tithe. *Harwood v. Sims*, Wightw. 112; *Deacle v. Hancock*, M'Clel. 85; S.C., 13 Price, 226. So, a written declaration of a deceased corporator was considered to be evidence in support of a custom to exclude foreigners. *Davies v. Morgan*, 1 C. & J. 587.

In order to the admission of evidence of reputation, it is not necessary that the fact of user should be shown: *Crease v. Barrett*, *supra*; although there are cases in which it has been so considered; see *Weeks v. Sparke*, 1 M. & S. 686; *Rushworth v. Craven*, M'Clel. & Y. 417; and it is obvious that such evidence without user will be of little weight.

Such declarations, as in questions of pedigree (*vide ante*, p. 46), must not have been made *post litem motam*. *R. v. Cotton*, 3 Camp. 444. But where, in a suit as to the custom of a manor, depositions in a former suit relative to a custom of the same manor were offered in evidence, it was held no objection that the depositions taken in the former suit were *post litem motam*, if the two suits were not upon the same custom; and where the former suit was very ancient, it was held unnecessary to prove by intrinsic evidence that the witnesses who made the depositions were in the situation in which they professed to stand, or that they had the means of becoming acquainted with the customs of the manor. *Freeman v. Phillips*, 4 M. & S. 486; but see *Banbury Peerage case*, 2 Selw. N. P. 2nd ed. 773, *ante*, p. 45.

The declarations of old persons *still alive*, cannot be admitted as proof of reputation. *Woolway v. Rowe*, 1 Ad. & E. 117.

Hearsay admissible when part of the transaction.] When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, and explanatory of it, it is admissible. Words and declarations are admissible when they accompany some act, the nature, object, or motive of which are the subject of the inquiry; 1 Phil. Ev. 194, 9th ed., cited by Crompton, J., *Hyde v. Palmer*, 3 B. & S. 657; 32 L. J., Q. B. 126, and see *Bennison v. Cartwright*, 5 B. & S. 1; 33 L. J., Q. B. 137. In the case of an equivocal act, the

accompanying declarations are often absolutely necessary to show the animus of the actor. Thus, if a debtor leaves home, the intent to avoid his creditors may be shown by his declarations at the time. *Bateman v. Bailey*, 5 T. R. 512. So a payment by a debtor may be explained by an accompanying request to apply it to a certain debt. In a suit for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods, their declarations at the time that they trusted him in consequence of the representation are admissible in evidence for them. *Fellowes v. Williamson*, M. & M. 306. So in an action against the drawer of a bill of exchange, what was said by the drawee, on the bill being presented, is evidence for the plaintiff as to want of assets; but not what passed between the drawee and the holder afterwards. *Prideaux v. Collier*, 2 Stark. 57. A letter sent by plaintiff to his indorser with the note on which the maker is sued, may be read for the plaintiff to show why it was sent. *Bruce v. Hurly*, 1 Stark. 24; and see *Kent v. Louen*, 1 Camp. 177. To prove that there was a good consideration for a conveyance, the verbal instructions of the alienor to his solicitor to prepare it are good evidence. *Tull v. Parlett*, M. & M. 472. In an action to recover money paid by a bankrupt in contemplation of a bankruptcy, his declarations as to the state of his affairs, made about the time of the transaction, are admissible for the plaintiffs. *Vacher v. Cocks*, M. & M. 353; *Herbert v. Wilcocks*, Id. 355, n. So in an action to recover fraudulent payments, answers to letters written by a bankrupt, requesting assistance, may be read to prove the refusal to give assistance, and his consequent knowledge of the state of his affairs. *Vacher v. Cocks*, *supra*. And see generally, as to declarations by bankrupts, *post*, Part III., tit. *Actions by trustees of bankrupts*. A trader being in embarrassed circumstances, executed an assignment of all his "effects, stock, books, and book-debts," for the benefit of his creditors: in an action after his death against the assignee, as executor *de son tort*, it was held that a list of creditors, made out by the direction of the assignor about the time of the execution of the assignment, was evidence for defendant for the purpose of rebutting fraud. *Lewis v. Rogers*, 1 C. M. & R. 48. Where felling timber is offered as an assertion of ownership, the declarations of the party so employed, showing ownership in another, are evidence to rebut it. *Per Parke, B., Doe d. Stansbury v. Arkwright*, 5 C. & P. 575.

Declarations are admissible as evidence of feelings, or of suffering: thus, in an action of assault on plaintiff's wife, evidence of what she said immediately on receiving the hurt is admissible for him. *Thompson v. Trevanion*, Skin. 402. The declarations of a wife at the time of her elopement that she fled from terror of personal violence from her husband, seem to be evidence against him. See *Aveson v. Kinnaird, Ltd.*, 6 East, 193. And there are other cases on the like principle decided in actions for adultery. See *Willis v. Bernard*, 8 Bing. 376.

In the *Gardiner Peerage* case, medical men were examined as to their experience of cases of protracted gestation. The commencement of the period of gestation was known to them only through the answers by women to questions relating to their sexual intercourse, menstruation, quickening, and other similar facts. Those answers were held inadmissible. *Le Marchant's Rep.*, 174-6. In *R. v. Johnson*, 2 Car. & K. 354, to ascertain the state of a woman's health a few days before her death, a witness (not medical) was allowed to state the answers of the deceased woman to inquiries made by him.

Statements by a deceased vendor, made at the time of the sale to indicate the land sold, are admissible to identify it. *Parrott v. Watts*, 47 L. J., C. P. 79.

The declarations of a plaintiff made in a conversation with the defendant, if part of the *res gestæ*, are admissible for the plaintiff as part of his evidence.

Hayslep v. Gymer, 1 Ad. & E. 162. See *post*, p. 64. But an act done cannot, in general, be qualified by isolated declarations made afterwards, *alio intuitu*. Thus the schedule of an insolvent, delivered four months after execution of a deed, was not admissible on behalf of the assignees to show that it was executed with intent to petition. *Peacock v. Harris*, 5 Ad. & E. 449. And a declaration by the obligee, as to the application of past payments made to him by the obligor, is not evidence as between the sureties. *Dunn v. Slee*, Holt, N. P. 401. Where general character is in issue, evidence of reputation is admitted. *Foulkes v. Selway*, 3 Esp. 236. See *Evidence of Character*, *post*, p. 83, and *Examination of witnesses*; *Evidence of character*, *post*.

It is not every declaration that is receivable in evidence, merely because it accompanies an act done by the speaker. Thus, we have seen, p. 48, *ante*, that where the object is to establish a public way, it is not legitimate evidence to prove that the tenant of land near it planted a tree, and whilst doing so, stated that he did it "to show the boundary of the road." *R. v. Bliss*, 7 Ad. & E. 550. The admissibility of the declaration depends not merely on its accompanying an act, but on the light which it throws upon an act which is, in itself, relevant and admissible evidence. See, generally, the opinions of the judges in *Wright v. Doe d. Tatham*, 7 Ad. & E. 313, 361, &c.; S. C., 4 N. C. 489, 498, 530, 544, 554, Ex. Ch. A declaration is sometimes receivable *per se*, as a claim. Thus, where the plaintiff asserts a right to goods under a sale to him by C., and the defence is that the alleged sale was collusive, defendant's witness may be asked, "whether he had not heard C. claim the goods after the sale?" Under such circumstances, a claim is as much an act done as if C. had taken the goods saying they were his. *Ford v. Elliott*, 4 Exch. 78. Where the object is merely to show that inquiries had been made for A. B. without success, the oral statement of his absence by a person at his residence is admissible evidence. *Crossby v. Percy*, 1 Taunt. 364; see further, *R. v. Kenilworth*, 7 Q. B. 642; and *post*, Part III.; *Actions by trustees of bankrupts*; *Acts of bankruptcy*; *Beginning to keep house*. But if it be necessary to show that A. B. is actually out of the realm, such oral statement is not evidence of it. *Robinson v. Markis*, 2 M. & Rob. 375.

It has been justly remarked that many of the above cases are not strictly instances of hearsay (*i.e.* second-hand) evidence, though commonly so classed. The *res gesta* in each case is original evidence; and the accompanying declaration, being part of it, is also original.

Acts or assertions of ownership.] Under the head of hearsay are usually classed those cases in which expired leases, grants, or other documents of a similar kind actively asserting a right on the part of the maker, have been admitted as evidence of that right in favour of persons claiming under him; they are, in fact, *acts of ownership*, and, as such, evidence of property. Thus, old leases of fishing places by the lord of an adjacent manor are evidence of a right to the bed of the river in favour of those who claim under him. Hale, *De Jure Maris*, p. 35; *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P. Where the question was, whether certain lands within a manor were subject to a right of common, counterparts of old leases, produced from among the muniments of the lord of the manor, from which it might be inferred that the land was demised by the lord free from such charge, were allowed to be evidence for the plaintiff claiming under him, though possession under the lease was not shown. *Clarkson v. Woodhouse*, 3 Doug. 189; 5 T. R. 412, n.; *Bristow v. Cormican*, 3 Ap. Ca. 641, D. P. And such counterparts are evidence of seisin, though only executed by the lessees. *Doe d. El. of Egremont v. Pulman*, 3 Q. B. 622; *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, C. A. So old entries of licences on the court rolls of

a manor, stating that the lords of the manor had the several fishery in a navigable river, and for certain rents had granted liberty of fishing, were held admissible to prove a prescriptive right in the lords of the manor without proof of payment under the licences; but such evidence is not entitled to much weight unless it be shown that in later times payments have been made under similar licences, or that the lords of the manor have exercised other more recent acts of ownership. *Rogers v. Allen*, 1 Camp. 309; see *Musgrave v. Inclosure Commissioners*, L. R., 9 Q. B. 162, 178. So an old table of tolls, kept by the town clerk of a corporation, by which the lessees of the tolls had always been guided in their collection, is admissible in favour of the claim of toll by the corporation. *Brett v. Beales*, M. & M. 419; *R. v. Carpenter*, 2 Show. 48. An ancient corporation book containing entries, showing what rents were due to the corporation, was held admissible as showing the exercise of acts of ownership. *Malcolmson v. O'Dea*, 10 H. L. C. 593. But mere entries in the corporation books of orders to grant leases, appointments of commissioners to manage them, &c., have been rejected as evidence. *Brett v. Beales*, M. & M. 429, and S. C., 5 M. & Ry. 433, 436. So an old entry of a resolution in the books of an eleemosynary corporation, being lay impropiators of tithes, that the tithe should, on default of payment of the accustomed payment in lieu of tithe, be taken in kind, is not evidence for them against a claim of modus, without proof that tithes in kind had in fact been taken in pursuance of such order. *Att.-Gen. v. Cleeve*, Somerset, Sum. Ass. 1841, per Rolfe, B. And generally, what any one writes or says in his own favour cannot be evidence for himself or his representative. *Glyn v. Bank of England*, 2 Ves. Sen. 43; *R. v. Debenham*, 2 B. & A. 185. Therefore, entries made by a deceased person, under whom the defendant claims, acknowledging the receipt of his rent for the premises in question, are not admissible for the defendant in proof of his title to them. *Outram v. Morewood*, 5 T. R. 121. So on a question whether the appointment of a curate belongs to the vicar or to a corporation, entries in old books belonging to the corporation are not evidence for them. *Att.-Gen. v. Warwick*, 4 Russ. 222. So, a survey of a manor, made by the owner, is not evidence against a stranger in favour of a succeeding owner. *Anon.*, 1 Stra. 95. But where A., seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed away, and, after a time, there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence between them. *Bridgman v. Jennings*, 1 Ld. Raym. 734. So, property may be identified by the books of the deceased steward of a person from whom both plaintiff and defendant derive title. *Doe d. Strobe v. Seaton*, 2 Ad. & E. 171.

Hence it appears that mere declarations of right, coupled with no other act, or actual exercise of it proved or presumable, are inadmissible as evidence in favour of the right asserted, except as against those who claim under the declarant. As to acts of ownership, see further, *post*, *Actions for trespass to land*.

Declarations of persons having no interest to misrepresent.] On this ground entries by a deceased rector, or vicar, as to the receipt of ecclesiastical dues are admissible for his successor. *Legross v. Levemoor*, 2 Gwill. 529; *Armstrong v. Hewitt*, 4 Price, 218; *Young v. Clare Hall*, 17 Q. B. 529. And even where the entries have been made by deceased impropriate rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance. *Anon.*, Bunn. 46; *Illingworth v. Leigh*, 4 Gwill. 1618. So they are admissible though the impropriator be a corporation aggregate; therefore, old receipts of tithe by the college of vicars-choral, Exeter, were admitted as evidence for them against a claim of modus. *Short v. Lee*, 2 J. & W. 478. Declarations of

a deceased rector are admissible as evidence of the custom of appointing churchwardens in his parish. *Bremner v. Hull*, L. R., 1 C. P. 748. The reception of this evidence has given rise to much observation, and is to be regarded as an exceptional case. And it is certain that, as a general rule, the mere absence of interest will not make the declarations of a deceased party evidence; *Sussex Peerage*, 11 Cl. & Fin. 85, 103, 112, 113; *Berkeley Peerage case*, *Id.* 109 n., in which cases, the declarations made by deceased clergymen were rejected as evidence of marriage, and the ruling of Lord Kenyon, in *Standen v. Standen*, Peake, 45, was denied.

On a somewhat similar principle the declarations of a testator as to his intentions are admissible to support his will if disputed on the ground of fraud, circumvention, or forgery. *Doe d. Ellis v. Hardy*, 1 M. & Rob. 525; *Doe v. Stevens*, Q. B., E. T., 1849, MS. So they are admissible to impeach the will by proving such fraud; *Doe d. Small v. Allen*, 8 T. R. 147; and *vide ante*, p. 20. So such declarations by a testator made before execution of his will are admissible to prove that alterations to the will or any incorporated document were made prior to execution; *In re Sykes*, L. R., 3 P. & M. 26, and *Dench v. Dench*, 2 P. D. 60; following *Doe d. Shallcross v. Palmer*, 16 Q. B. 47; 20 L. J., Q. B. 367; but declarations made after execution cannot so be used. S. C. In the case of a lost will declarations by a testator as to its existence and contents, and whether made before or after execution, are admissible. *Sugden v. S. Leonards, Ltd.*, 1 P. D. 154, C. A. So such declarations are admissible to show what papers constitute the will. *Gould v. Lakes*, 6 P. D. 1.

Hearsay of persons against their own interest admissible.] In a variety of cases, the declarations of deceased persons (not parties) made against their own interest have been admitted. See the cases collected, *Barker v. Ray*, 2 Russ. 67, n. And they are admissible as evidence of all the facts therein stated, though some of them may not have been within the party's own knowledge; for the whole declaration must be taken together. *Crease v. Barrett*, 1 C. M. & R. 919; *Percival v. Nanson*, 7 Exch. 1; 21 L. J., Ex. 1; and see *R. v. Birmingham*, 1 B. & S. 763; 31 L. J., M. C. 63. Thus the time of a child's birth was proved by production of the book of the deceased man-midwife referring to the ledger, in which ledger his charge for attendance was marked as paid, there being also evidence adduced that the work was done. *Higham v. Ridgway*, 10 East, 109. It seems that such an entry was admissible, though the party, if living, could not have been examined as being an interested party; *Gleadow v. Atkin*, 1 Cr. & M. 424, per Bayley, B. *Accord. Short v. Lee*, 2 J. & W. 489. So the book of a deceased mason, containing charges for repair of a bridge, marked as paid, was admitted to prove repairs, and so to fix a parish with an obligation. *R. v. Heyford*, 2 Smith's L. Cases, 8th ed. 346; *cor. Parke, B.* So an entry by a deceased person, J., "J. W. paid me 3 months' interest," followed by other entries indicating a loan to J. W., is *prima facie* against J.'s interest, and admissible in evidence. *Taylor v. Witham*, 3 Ch. D. 605. In these last two cases the decision of Littledale, J., in *Doe d. Gallop v. Voules*, 1 M. & Rob. 261, was disapproved. All the cases on the subject are collected in the note to *Higham v. Ridgway*, 2 Smith's L. Cases.

A letter from a deceased manager of the plaintiff's business, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent, is not admissible, the possibility of pecuniary loss to the manager, in the event of the loss of the cases, being too remote. *Smith v. Blakey*, L. R., 2 Q. B. 326. The day-book and ledger of a deceased broker, debiting himself with the price of shares bought, is not evidence of the purchase, as an entry made against interest, for it might have been to the advantage of the deceased. *Massey v. Allen*, 13 Ch. D. 558.

The admissibility of the book in *Higham v. Ridgway*, *supra*, depended on

the *pecuniary* interest of the deceased, and it is settled that an interest arising from the liability of the party to a prosecution, if his statement was true, is not such an interest as will make his declarations evidence; and for this reason the statement of a clergyman that he had celebrated an irregular marriage was held not to be evidence of the marriage. *Sussex Peerage*, 11 Cl. & Fin. 85, 107. Nor is the declaration of a party admissible merely because he would, if alive, have been excused from answering questions on the subject. *S. C.*, *Id.* 110.

Entries by a deceased steward, of money received by him from different persons in satisfaction of trespasses committed on the waste, and thereby charging himself to the amount received, are admissible to prove that the right to the soil of the waste was in his master. *Barry v. Bebbington*, 4 T. R. 514. And if the entries be old and the document comes from the proper custody, the handwriting need not be proved. *Wynne v. Tyrchitt*, 4 B. & A. 376. So a receiver's entry of a receipt of separate rents from A., due from himself and two others, B. and C., is a proof of payment not only by A., but also by B. and C., although the rents of B. and C. do not appear to have been paid directly to the receiver; *Percival v. Nanson*, 7 Exch. 1; 21 L. J., Ex. 1; and it is enough if a steward's account be signed by a third person for the real steward, where the authority to sign for him appears on the books containing the arrears to have been recognized, and the person so signing debits himself with the balance. *Doe d. Ashburnham v. Michael*, 17 Q. B. 276; 20 L. J., Q. B. 480. A bill of lading, signed by a deceased master of a vessel, for goods deliverable to a named consignee, is evidence of property in the consignee, even in trover for the goods against a third person. *Per Lawrence, J.*, *Haddow v. Parry*, 3 Taunt. 305. Receipts of rent by a steward, specifying the tenure of the land in respect of which it is paid, have been held evidence of the tenure. *Doe d. Harpur v. Dodd*, 3 Wooddeson Comm. 332. So where the deceased agent of the owner A., of the servient tenement, paid 6*l.* to A., stating that it was for the lights of the dominant tenement, this was held to be evidence, against a subsequent owner of the latter, of payment of the rent. *Bewley v. Atkinson*, 13 Ch. D. 283, C. A. The same point was raised but not decided in *Fursdon v. Clogg*, 10 M. & W. 572. In an action against a co-surety for contribution, a receipt given by the deceased creditor, professing to acknowledge a payment by the plaintiff of a sum of money, "originally advanced to E. H.," is evidence not only of the payment, but also of the original advance to E. H. as principal debtor. *Davies v. Humphreys*, 6 M. & W. 153.

A declaration by a deceased occupier of land, that he rents it under a certain person, is evidence of that person's seisin; *Peaceable d. Uncle v. Watson*, 4 Taunt. 16; see also *Carne v. Nicholl*, 1 N. C. 430. The principle is, that occupation being presumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's presumed proprietary interest; *Crease v. Barrett*, 1 C. M. & R. 931; and, therefore, a declaration by a deceased copyholder, that he held only for his life, is evidence of such limited interest; *Doe d. Welsh v. Langfield*, 16 M. & W. 497; and such declaration may be proved by production of the official books of an inclosure commission kept under an act of parliament, and containing an entry of a claim made by the declarant. *S. C.* Or, by the recital in a deed to which deceased was a party. *Sky v. Sky*, 2 P. D. 91. But the declaration of a party in possession, as to what he heard a third person say, is not evidence to cut down his estate, unless he has himself expressed his own belief of the statement. *Trimblestorn v. Kemmis*, 9 Cl. & Fin. 780. A declaration by a person in the management of an estate that he managed for his son is evidence of the son's interest. *De Bode's case*, 8 Q. B. 208. A deed by a deceased party, shown to be in the receipt of the rents and profits, in

which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. *Doe d. Daniel v. Coulthred*, 7 Ad. & E. 235. So, a written attornment to L. by a tenant in possession is evidence of L.'s seisin. *Doe d. Lindsey v. Edwards*, 5 Ad. & E. 95. Acceptance by A. of an allotment under an inclosure award is evidence that previously the allotment was not A.'s land. *Gery v. Redman*, 1 Q. B. D. 161.

Land was held by A., B., C., &c., as successive tenants for life, with power to lease for 21 years, reserving the ancient rent. A paper in which the rent of the land was stated, indorsed by A., "a particular of my estate," was held admissible to show what the ancient rent was, for A. had an interest to make the rent as low as possible, and so increase the fine upon renewal. *Roe d. Brune v. Rawlings*, 7 East, 279. A declaration by a deceased person, that he held certain land as tenant at a rent of 20*l.* a-year, was held to be evidence, in a question of settlement of a pauper, that the rent was over 10*l.* a-year. *R. v. Birmingham*, 1 B. & S. 763; 31 L. J., M. C. 63; *R. v. Exeter Union*, L. R., 4 Q. B. 341.

An oral declaration is as admissible as a written one. S.CC.; *Bewley v. Atkinson*, 13 Ch. D. 283, C. A.

Entries by a deceased collector of rates, charging himself with the receipt of money, and made by him in the books of his office, are admissible against his surety to prove the receipt. *Goss v. Watlington*, 3 B. & B. 132. And the same has been held with regard to the entries of a clerk as against his surety. *Whitnash v. George*, 8 B. & C. 556. So, entries in the land-tax collector's book stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe d. Smith v. Cartwright*, Ry. & M. 62. See also *Doe d. Strobe v. Seaton*, 2 Ad. & E. 171. So, entries made by a deceased collector of taxes in a *private* book, charging himself with the receipt of money, are evidence against a surety of the receipt of the money, though the parties who paid it are alive, and might be called. *Middleton v. Melton*, 10 B. & C. 317.

It seems that the entries of *receipts* by a deceased accountant are admissible, though the *balance* may be discharged or be in his own favour. *Rowe v. Brenton*, 3 M. & Ry. 268; *Acc. per* Patteson, J., *Williams v. Geaves*, 8 C. & P. 593. And ancient ministers' accounts, rendered to the lord of the manor, and debiting themselves with the issues and profits of the manor, are admissible evidence in favour of a successor to show the possession of port dues, though the roll shows the account balanced and a quietus at the end of it; *per* Lord Denman, C. J., in *Brune v. Thompson*, London Sittings after M. T. 1841; *Acc. Erskine, J.*, S. C., Bodmin Sp. Ass. 1842. So, ancient receivers' accounts of a city, though unsigned, and in the third person, are admissible on behalf of the city, to prove the receipt of port dues. *Exeter, Mayor of, v. Warren*, 5 Q. B. 773. So, old accounts rendered to the corporation of vicars-choral, Exeter, by their officers, showing receipt of tithe, and balanced by payment, and a quietus, are evidence for them, against a modus. *Short v. Lee*, 2 Jac. & W. 464. In *Beaufort, Dk. of, v. Smith*, 4 Exch. 450, accounts rendered to the plaintiff's ancestors, lords of Gower, by his receivers, showing the receipt of a manorial toll on coal exported out of the manor, formed the principal evidence upon which the plaintiff's right to it was established. So, in *Waddington v. Newton*, Wint. Sum. Ass. 1850, Coleridge, J., admitted the ministers', or receivers', accounts of the bishopric of Winchester, extending from the reign of John to Hen. 8, to show a right of fishery in the lord, by continual receipt of the issues of the fishery, value of fish sold, &c. In *Doe d. Kinglake v. Bevis*, 7 C. B. 456, the same series of accounts was tendered, to show the lord's ownership of a certain wood, as against the copyholder, who claimed it; for this purpose, the lord relied upon entries of receipts on the sale of timber, and also

entries in the same roll in which the accountant discharged himself by payment of wages to the woodward of the same wood : the court held the receipt admissible, but not the discharge ; and they cited *Knight v. Waterford*, 4 Y. & Coll. 293, in which the accounts of a deceased receiver were admitted to prove the receipt of rent for tithes by the lord of the manor, but not to prove his liability to pay land-tax and poor-rate on them, by showing that the account had always allowed the amount to the person paying the rent, the two entries being separate and unconnected. *Accord. Whaley v. Carlisle*, 15 W. R. 1183, July, 1867, Ir. Ex. Ch. In *Bullen v. Michel*, 2 Price, 399, certain account rolls of the Abbey of Glaston were tendered, to prove payment of tithe by certain lands of the abbey ; the accounts showed receipts by the reeve, and payments out of the moneys received, which accounts were allowed at the foot by the bailiff of the abbey ; among the payments were payments in respect of the tithe in question : they were put in evidence by the vicar to disprove a modus set up by the defendant, and other landowners who did not claim under the abbey, but whose claim was shown to be inconsistent with the above payments by the abbey ; they were held admissible both as to charge and discharge, because the two were part of one account, and because the discharge had been allowed by the bailiff of the abbey. Whether this case can be reconciled with *Doe d. Kinglake v. Bevis*, and *Knight v. Waterford*, *supra*, by any sound distinction, may be questionable. It is observable on this class of documents, that old *computi*, i.e., accountants' rolls, are almost invariably written in the third person, and name the accountant only at the head of the roll, and sometimes refer to *particulars* of the account elsewhere. It is further observable, that a distinction has been taken between the public accounts of crown officers and the accounts of private persons in favour of the superior credit due to the former, as public records.

In order to show title to a quit rent, a party put in evidence a signed rental 100 years old, charging the party signing it, found in the same box with contemporaneous unsigned accounts, the amount of the sum received being the same in both papers : held, that the accounts and rental together were admissible. *Musgrave v. Emmerson*, 10 Q. B. 326 ; 16 L. J., Q. B. 174. These two reports differ materially.

If the party who made the entry be alive, though out of the jurisdiction of the court, so that he cannot be called, the proof or the entry is generally inadmissible. *Stephen v. Gwenap*, 1 M. & Rob. 121. Where plaintiff showed payment of rent to A. B. in order to prove a tenancy under him, and not under defendant, defendant was not allowed to rebut the evidence by producing written accounts rendered by A. B. to him of these very rents, A. B. being alive and not called. *Spargo v. Brown*, 9 B. & C. 935. After the lapse of a long time, the death of the party accounting will be presumed : and in one case the lapse of 55 years was considered enough to dispense with proof of death, although, if alive, he would not have been of an age beyond the ordinary term of human life. *Doe d. Ld. Ashburnham v. Michael*, 17 Q. B. 276 ; 20 L. J., Q. B. 480.

Generally the question of admitting statements against interest made by deceased persons occurs where the suit is *inter alios*, and the declarant is a stranger to it ; and it has therefore been doubted whether, in a suit by an executor to recover the balance due on an alleged contract for work done, the plaintiff could put in evidence a declaration of the testator to a third person respecting a payment made by the defendant to the testator, in order to prove the liability of the defendant for certain extra work. *Per Jervis, C. J.*, in *Edie v. Kingsford*, 14 C. B. 759 ; 23 L. J., C. P. 123. But in *Bradley v. James*, 13 C. B. 822 ; 22 L. J., C. P. 193, where the plaintiff sued as executor of the payee of a note, he was allowed to rebut the Statute of Limitations by proof of a written acknowledgment made

in a book by the testator, of payment of interest on the note by defendant within six years. So, entries on the debtor side of testator's account-book of the receipt of interest on a sum of money for which the executors were suing, were held admissible to prove that the money was lent, and not given, to the defendant, the testator's son. *Peck v. Peck*, 21 L. T., N. S. 670, H. T. 1870, C. P. The cases decided on *Searle v. Barrington*, *Id.*, mentioned *ante*, p. 36, also favour the reception of such declarations.

The declarations against interest of persons who at the time of making them stood in the same situation and interest as the party to the suit, are evidence against that party; thus, the declaration of a former owner of plaintiff's land, that he had not the right claimed by plaintiff in respect of it, is admissible. *Woolway v. Rowe*, 1 Ad. & E. 114. Such declarations are admissible though the maker is alive and not produced. S. C. So, the landlord's description of property in a former lease is evidence for a third person against a subsequent lessee of the same landlord, but not against a prior lessee. *Crease v. Barrett*, 1 C. M. & R. 919. A declaration in an answer in Chancery by one who has sold property, is not evidence against a person claiming under him by a conveyance anterior to the bill filed. *Gully v. Ezeler*, *Bp. of*, 5 Bing. 171. The declarations of tenants are not evidence against reversioners, though their acts are. *Per Patteson, J.*, *Tickle v. Brown*, 4 Ad. & E. 378; *Accord. Papendick, v. Bridgewater*, 5 E. & B. 166; 24 L. J., Q. B. 289.

The declarations of parties identified in interest with those against whom they are offered are in the nature of admissions, and as such belong rather to another head of evidence. See tit. *Admissions*, *post*, p. 59.

Hearsay of persons making entries, &c., in the regular discharge of their ordinary business or office.] Where an entry or declaration is made by a *disinterested* person in the course of discharging a professional or official duty, it is, in general, admissible after the death of the party making it. Thus a notice, indorsed or served by a deceased clerk in a solicitor's office, whose duty it was to serve notices, is evidence of service. *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890; *Doe d. Padwick v. Skinner*, 3 Exch. 84; *R. v. Dukinfield*, 11 Q. B. 678. So, the entries in the books of a deceased solicitor in his handwriting relating to a deed prepared by him and executed by a deceased client were held good evidence of the execution of the deed. *Rawlins v. Rickards*, 28 Beav. 370. See *Waldy v. Gray*, L. R., 20 Ex. 238; *Sly v. Sly*, 2 P. D. 91. But it must first be shown *aliunde* that the solicitor was authorised to act for the person on whose behalf he purported to act. *Bright v. Legerton*, 2 D. F. & J. 606. A receipt signed by a clerk employed by a collector to collect for him, proves a payment to the collector himself. *R. v. S. Mary, Warwick*, 1 E. & B. 816; 22 L. J., M. C. 109. It should seem on principle that contemporary *oral* declarations so made in course of business may also be admissible. *Per Lord Campbell*, *Sussex Peerage case*, 11 Cl. & Fin. 113; *Semb. acc. per cur.* in *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J., Q. B. 5. Whether an oral statement made by a receiver on paying over money is evidence not only of the receipt, but also of the very party from whom it was received, was discussed but not decided, in *Fursdon v. Clogg*, 10 M. & W. 572. An attorney's bill with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which is proved to be in the handwriting of a deceased clerk, whose duty it was to deliver a copy of the bill, and proved to have existed at the date, has been held to be evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Stark. 404. It has been held that a banker's ledger was receivable in evidence in an action between the assignees in bankruptcy of a customer

and a third party, to show that the customer at a certain time had *no funds* in the banker's hands, without calling the clerks who made the entries therein. *Furness v. Cope*, 5 Bing. 114. *Seem*, such evidence would not be admissible to *prove assets*. S. C. But now see the Bankers' Books Evidence Act, 1879, *post*, p. 116. An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour, after the clerk's decease. *Poole v. Dicus*, 1 N. C. 649. In *Marks v. Lake*, 3 N. C. 408, an entry by a deceased clerk of the plaintiff's attorney, in a daybook, stating a tender by him and refusal by the defendant, was held evidence of a replication to that effect; but there was a previous entry of a *receipt* by him of the money for the purposes of such tender.

Upon the same principle, *contemporaneous* entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Torrington, Ltd.*, 1 Salk. 285; and cases cited by Parke, J., *Doe d. Patteshall v. Turford*, 3 B. & Ad. 698.

In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad, and not likely to return, is not sufficient. *Cooper v. Marsden*, 1 Esp. 1. The entry, too, must be by the person who actually did the act recorded by it. *Polini v. Gray*, 12 Ch. D. 411, C. A. Thus, an entry of goods sold made by a witness on the dictation of A., who had received information of the sale from B., a servant of the vendor, whose duty it was to report the sale to A., was rejected as evidence of the sale, though A. and B. were both dead. *Brain v. Preece*, 11 M. & W. 773. Where a person employed to serve a notice on R. brought back the duplicate notice indorsed as so served, but stated orally that he had delivered it to W., it was held, that, after the death of the person serving, it was not competent to give in evidence his oral statement of service on W. *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J., Q. B. 5. As to proof of notice of calls made by a public company from the memorandum of a deceased clerk, see *E. Union Ry. Co. v. Symonds*, 5 Exch. 237, cited *post*, Part III., *Actions by companies*. An entry in a letter-book kept by a deceased clerk in the course of duty is secondary proof of the contents of the letter sent, and of the posting of it, if that was the course of business. *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, *ib.* 379.

By stat. 7 Jac. 1, c. 12, s. 1, the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for his said debt, or shall have brought against him, or his executors, some action for the said debt within a year next after the delivery of the wares, or the work done. By sect. 2, the act is not to extend to traffic, or dealing between merchant and merchant, merchant and tradesman, or tradesman and tradesman, for anything within the compass of their mutual trades and merchandise.—This statute seems to recognise the previous admissibility of shop-books. But the act is of little practical importance, and the admissibility of such books at common law, in favour of the tradesman, must generally depend on the principles already referred to. See *Symonds v. Gas Light Co.*, 11 Beav. 283.

Entries made by deceased persons in the course of their business, or in discharge of their duty, are admissible only where it is the duty of the deceased both to do the act and to make an entry or record of having done it. *Smith v. Blakey*, L. R., 2 Q. B. 326; *Massey v. Allen*, 13 Ch. D. 558.

Thus an entry of a hiring at certain wages in the deceased master's private book, with a memorandum of payment, is inadmissible evidence, *inter alios*.

R. v. Worth, 4 Q. B. 132; for it was neither his duty to make it, nor was he interested in making it in the proper sense of "interest." An entry purporting to be the substance of a lease made by the lord of a manor, contained in a book of his steward 200 years old, is not evidence of the lease either as secondary evidence or as an entry made in the course of duty or business. *Doe d. Padwick v. Skinner*, 3 Exch. 84. See also *Doe d. Padwick v. Wittcomb*, 6 Exch. 601; 20 L. J., Ex. 297; 4 H. L. C. 425.

Entries made in the log of a ship by a deceased mate cannot be used as evidence for her owners in an action brought against them for collision. *The Henry Coxon*, 3 P. D. 156.

A book in which a deceased chief rabbi had made an entry of circumcisions performed by him, was held inadmissible to prove the age of a Jew, although it was proved that a Jew was ordinarily circumcised on the eighth day after his birth. *Davis v. Lloyd*, 1 Car. & K. 275, cor. Denman, C. J., after consulting Patteson, J.

In *Edie v. Kingsford*, 14 C. B. 759; 23 L. J., C. P. 123, Jervis, C. J., stated that declarations "in the course of business" were, while declarations "in the course of duty" were not, receivable in evidence, but the cases, *supra*, recognise no such distinction.

Though a contemporaneous entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible, yet the statement in it of other extraneous circumstances, however naturally they may find a place in the narrative, is no proof of these circumstances. *Chambers v. Bernasconi*, 1 C. M. & R. 347; 4 Tyrw. 531; Ex. Ch.; *Polini v. Gray*, ante, p. 58. Thus, a return by a sheriff's officer of an arrest at a specified place is not evidence, *inter alios*, of the place of arrest. *Chambers v. Bernasconi*, *supra*. There are some important distinctions between the effect of declarations against interest and declarations made in the course of office or business. The former declarations are evidence of all the facts stated and whensoever made; the latter are evidence only of the facts which it was the business of the officer or writer to state, and they must generally be contemporaneous with the act done. *Smith v. Blakey*, *supra*, *per cur.*

The cases on this subject are collected in 1 Smith's L. Cases, notes to *Price v. Torrington, Ltd.*

As to entries in public books, registers, &c., see *post*, *Effect of documentary evidence*.

ADMISSIONS.

Admissions by a party to the record out of court are evidence, and primary evidence, of the fact so admitted. In an action by M. and his wife, for injuries caused to the wife by defendants' negligence, the defendants were allowed to prove that M. and C., his attorney's clerk, had conspired to suborn false witnesses, as this was an admission, by conduct, of M., that he had a bad case. *Moriarty v. L., Chatham, & Dover Ry. Co.*, L. R., 5 Q. B. 314. The letters of a party may be proved against him without producing the rest of the correspondence on either side. *Barrymore, Ltd., v. Taylor*, 1 Esp. 326. But though the express admissions of a party to the suit, or admissions implied from his conduct, are evidence against him, he is at liberty to prove that such admissions were mistaken or untrue, except in the case of estoppel. *Per Bayley, J., Heane v. Rogers*, 9 B. & C. 586. And it matters not whether the mistake arose from misapprehension of law or of fact. Thus, it may be shown that the admission was made under an erroneous view of the party's own legal liability; *Newton v. Liddiard*, 12 Q. B. 925; as where defendant made admissions under an impression that provisional committee-men were liable for work done for a company. *S. C.*,

Id. See also *Bailey v. Macaulay*, 13 Q. B. 815. Such a mistaken impression, however, will not exclude his admission, though it will impair its weight as evidence against him. *Newton v. Belcher*, 9 Q. B. 612. The value of an admission depends on the circumstances under which it was made; where it is a mere inference drawn from facts, the admission goes no further than the facts prove. See *Bulley v. Bulley*, L. R., 9 Ch. 739. An admission that his trade is a nuisance is evidence, though not conclusive, against a defendant. *R. v. Neville*, 1 Peake, 91.

By Rules, 1883, O. xxxii., r. 1, "any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Admissions made with a view to a compromise and in order "to buy peace," are not evidence against the maker. B. N. P. 236. But an acknowledgment of a party's handwriting, though made pending a treaty of compromise, is evidence against him. *Waldridge v. Kennison*, 1 Esp. 143. So an admission of facts before arbitrators. *Gregory v. Howard*, 3 Esp. 113. An offer of a specific sum by way of compromise is evidence, unless accompanied with a caution that the offer is confidential, or without prejudice. *Wallace v. Small*, M. & M. 446; *Nicholson v. Smith*, 3 Stark. 128. But generally, neither letters written "without prejudice," nor replies to such letters, though not similarly guarded, can be used as evidence, *Paddock v. Forrester*, 3 M. & Gr. 903; *Hoghton v. Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482, 725, 728, and see *In re River Steamer Co.*, L. R., 6 Ch. 822. So, where a correspondence has begun with a letter written "without prejudice," that covers the whole correspondence. *Ex parte Harris*, 44 L. J., Bk. 33. Offers made without prejudice have, however, sometimes been allowed to be given in evidence for the person making the offer, to show a willingness to settle the dispute. *Jones v. Foxall*, 15 Beav. 388; 21 L. J., Ch. 725; *Williams v. Thomas*, 2 Dr. & S. 29; 31 L. J., Ch. 674.

Admissions on compulsory process.] It is no objection to the proof of an admission that it was made under compulsory process; thus, an answer to a bill in Chancery, filed against the defendant by a stranger, may be read against him, to show the admission of a particular fact. *Grant v. Jackson*, Peake, 203. So, the defendant's answer to interrogatories administered by the plaintiff to him in another suit is admissible against him. *Fleet v. Perrins*, L. R., 3 Q. B. 536, Ex. Ch.; L. R., 4 Q. B. 500. But *semb.* the compulsion must not be illegal. *R. v. Garbett*, 1 Den. C. C. 236. See *R. v. Coote*, L. R., 4 P. C. 599. The examination of a party before commissioners of bankrupt is evidence against him; *Robson v. Alexander*, 1 Moore & P. 448; *R. v. Wheeler*, 2 Moo. C. C. 45; although there was an irregularity in the proceedings which had been waived by the appearance of the bankrupt for examination; *R. v. Widdop*, L. R. 2 C. C. 3; or though part only of his deposition was noted down; *Milward v. Forbes*, 4 Esp. 172; or though the compulsory power was exercised on irrelevant matters. *Stockfleth v. De Tastet*, 4 Camp. 10. So testimony given in Court may be used in an action against the witness, though he was prevented from entering into an explanation of the circumstances under which the fact took place, it being irrelevant. *Collett v. Keith, Ltd.*, 4 Esp. 212. So testimony on process to compel attendance before the House of Commons. *R. v. Mercer*, 2 Stark. 366. See *obs.* in *R. v. Gilham*, 1 Moo. C. C. 203. But such compulsory admission is no evidence of an account stated. *Tucker v. Barrow*, 7 B. & C. 623.

Admission of the contents of documents.] Though the contents of a written instrument cannot in general be proved by a witness without production of

it (see *ante*, p. 1) ; yet what a party to the record says is *primary* evidence against himself as an admission, though it relates to the contents of a written instrument, and though the contents be directly in issue in the cause. This was first deliberately ruled in *Slatterie v. Pooley*, 6 M. & W. 664 ; followed by *King v. Cole*, 2 Exch. 628 ; *Fox v. Waters*, 12 Ad. & E. 43. The doctrine has been impugned and regarded as objectionable. See *Lawless v. Queale*, 8 Ir. L. Rep. 382 ; it is, however, established by subsequent cases. There can be no doubt, however, that such an admission ought in some cases to have no weight ; as where the party relying upon it is manifestly withholding more satisfactory evidence in his own power ; or where the admission assumes a degree of knowledge, whether of law or of fact, which the party admitting is not likely to possess ; as the construction of a deed of settlement ; the contents of a fine or recovery, &c. " If the plaintiff is himself in the box, you may ask him as to the contents of a document, and his answer will be good evidence. . . . Perhaps the judge might say that the document ought to be produced. I should do so myself in some cases." *Per* Pollock, C. B., in *Farrow v. Blomfield*, 1 F. & F. 653. See also the observations in *Boulter v. Peplow*, 9 C. B. 493 ; 19 L. J., C. P. 190. To make such oral admission of any value when it relates to a written document, it ought to be clear and distinct ; thus where the defendant, in order to show that an expired lease had been renewed by the ancestor of the plaintiff, proved a statement by the ancestor many years ago, that the land had been "new-lived" by him, without more, it was held insufficient. *Doe d. Lord v. Crago*, 6 C. B. 90.

A statement made by the plaintiff that his demand for work done had been referred to an arbitrator, who awarded that nothing was due, was admitted as evidence against him. *Murray v. Gregory*, 5 Exch. 468. The registered copy of a deed, signed and certified by the plaintiff, was held to be primary evidence of its contents against him. *Boulter v. Peplow*, *supra*. A copy of a document sent by a party is primary evidence against him. See *Stowe v. Querner*, L. R., 5 Ex. 155, 159. A machine copy of a letter written by the plaintiff to a third person, may be used as an admission on the part of the plaintiff, though not admissible as a letter. *Nathan v. Jacob*, 1 F. & F. 452. So an abstract of title containing recitals, which had been relied upon by the defendant in a suit in Chancery, was admitted as evidence against him in a subsequent action of the matters so recited, without producing the original deeds. *Pritchard v. Bagshaw*, 11 C. B. 459 ; 20 L. J., C. P. 161. See also *R. v. Basingstoke*, 14 Q. B. 611.

The following are some of the earlier cases bearing on the same doctrine :—The terms of a lease may be proved by oral admissions. *Howard v. Smith*, 3 M. & Gr. 254. An oral admission of a debt is evidence on an account stated, though it refers to a written instrument not produced. *Newhall v. Holt*, 6 M. & W. 662. A defendant in an action for the recovery of land may prove an admission of the plaintiff that he had sold and assigned his lease to a third person, though such assignment must be in writing. *Doe d. Lowden v. Watson*, 2 Stark. 230. A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them to the dissolution, though the partnership was by deed. *Doe d. Waithman v. Miles*, 1 Stark. 181 ; 4 Camp. 373. It was formerly held, that an admission in an answer in Chancery of the execution of a deed was only secondary evidence, and did not supersede the necessity of proving it in the regular way. *Call v. Dunning*, 4 East, 53 ; *Cunliffe v. Sefton*, 2 East, 187, 188. So with regard to matters of record and judicial proceedings, as the insolvency and discharge of the plaintiff, oral evidence of admissions has been held insufficient. *Scott v. Clare*, 3 Camp. 236. But since the case of *Slatterie v. Pooley*,

ante, p. 61, the cases of *Scott v. Clare*, *Call v. Dunning*, *ante*, p. 61, and other earlier cases are open to question.

Admissions by acquiescence.] Admissions may sometimes be presumed from the silence or conduct of a party when certain statements are made. On this ground it is that the uncontradicted statements of any one, made in the presence and hearing of the party against whom they are offered, are evidence. *Bessela v. Stern*, 2 C. P. D. 265, C. A. But of course no inference against him can be reasonably drawn, if the fact stated before him be one which is plainly not within his own knowledge; for he may be unable either to admit or contradict it. So the deposition of a witness, taken in a judicial proceeding against a party, is not evidence in another proceeding against that party merely on the ground that he was present, and did not cross-examine or contradict the witness; *Melen v. Andrews*, M. & M. 336; for the nature of a judicial proceeding prevents a party from interposing to contradict or comment on the statement of a witness, as he would in common conversation. *Accord. per Alderson, B.*, in *Short v. Stoy*, Winton Sum. Ass. 1836. Cases, however, may occur, in which the refusal of a person to contradict or cross-examine a witness, even in a judicial proceeding, may be admissible. See *Simpson v. Robinson*, 12 Q. B. 511, cited *post*, *Action for defamation; Proof of malice*.

It should be observed, that although silence has been considered to be evidence of assent to a statement made orally in the presence of the party, no such inference can be fairly drawn from the mere omission of a party to reply to a letter; *Felthouse v. Bindley*, 11 C. B., N. S. 869, 875; 31 L. J., C. P. 204, 206, *per Willes, J.*; *Richards v. Gellatly*, L. R., 7 C. P. 131, *per Id.*; unless sent under circumstances which entitle the writer to an answer. See *Edwards v. Towels*, 5 M. & Gr. 624; *Richardson v. Dunn*, 2 Q. B. 218. A statement which may be, but is not, immediately contradicted without further trouble than an oral denial, may be presumed to be true; but no one is, or ought to be, expected to answer every officious letter that is written to him. It has been held, however, that such a letter may sometimes be used as evidence of a demand, and of so much as may explain the demand. Thus, where the plaintiff discovered that he had inadvertently paid a debt to the defendant twice over, and his accountant wrote repeatedly to the defendant, explaining how the mistake arose, and requesting repayment, but the defendant took no notice of the letters, it was held that the letters were all admissible in evidence against him in an action to recover back the payment. *Gaskill v. Skene*, 14 Q. B. 664; and see *Fairlie v. Denton*, 3 C. & P. 103. So in the case of a letter written by A. to B., to which the position of the parties justifies A. in expecting an answer,—as where the subject of it is a contract or negotiation before pending between them,—the silence of B. may be important evidence against him. See *Lucy v. Mouffet*, 5 H. & N. 229; 29 L. J., Ex. 110, cited *post*, *Action for goods sold*; where the plaintiff puts in the letter written in his behalf by a third person to the defendant, the defendant is entitled to put in his answer to it, although it states, as a fact, a circumstance which, if true, is a defence to the action, for it shows that that circumstance has been brought under the defendant's notice. *Carne v. Steer*, 5 H. & N. 628; 29 L. J., Ex. 281.

The following are also examples of admissions implied from negative conduct or acquiescence:—If A. having title to premises in the possession of B., suffers B. to make alterations inconsistent with such title, it is evidence to go to the jury that A. has recognised the right of B., and has done such acts as are necessary to confirm it. *Doe d. Winckley v. Pye*, 1 Esp. 364. So where, upon a building lease of 59 feet, more or less, the lessee took 62½ feet, but the ground taken agreed with the abutments in the lease, and the

lessor marked out the ground, and saw the progress of the defendant's building without objection, this is evidence of the lessee's title. *Neale d. Peroux v. Parkin*, *Id.* 229. And in action for a debt, evidence that the plaintiff was an insolvent debtor, and had not inserted the debt in question in his schedule, was an admission, as against him, of its not being due. *Nicholls v. Downes*, 1 M. & Rob. 13. But it was held that the attesting witness of the schedule must be called to prove it. *Streeter v. Bartlett*, 5 C. B. 562. As to which see, however, *Bailey v. Bidwell*, 13 M. & W. 73, *post*, p. 126.

To this head may also be referred the case in which the depositions or statements of third persons have been held to be evidence against a party who has, on a former occasion, caused them to be made and used them as true for his own purposes. *Brickell v. Hulse*, 7 Ad. & E. 455; *Gardner v. Moul*, 10 Ad. & E. 464; *Richards v. Morgan*, 4 B. & S. 641; 33 L. J., Q. B. 114, *cited post*, *Effect of depositions*; and the comments *per curiam*, in *Boileau v. Rutlin*, 2 Exch. 679, 680. But in an action by a bankrupt against his assignees to try the validity of his commission, depositions of deceased persons taken under the commission, and enrolled by the assignees, were not evidence against them as admissions by reason of such enrolment. *Chambers v. Bernasconi*, 1 C. M. & R. 347.

As to admissions by parties identified in interest, see *ante*, tit. *Hearsay*, p. 48; and see *post*, p. 64, *et seq.*; *Admissions by trustees, &c.*

Receipts.] At common law the acknowledgment in a deed of the receipt of money was conclusive evidence as between the parties to it of such receipt. *Baker v. Dewey*, 1 B. & C. 704; *Rowntree v. Jacob*, 2 Taunt. 141. But not where the recital of the deed showed only an "agreement to pay," and the receipt was of money "so paid as above mentioned;" as usual in purchase deeds. *Bottrell v. Summers*, 2 Y. & J. 407; *Lampon v. Corke*, 5 B. & A. 606. Nor was the receipt indorsed on the back of the deed conclusive. *Sutton v. Rastall*, 2 T. R. 366. In equity the absence of a receipt at the back of the deed would put a subsequent purchaser on inquiry as to whether the purchase money had been paid; see *Kennedy v. Green*, 3 Myl. & K. 699; for the land in the hands of a purchaser with notice that the prior purchase-money remained unpaid, or of a volunteer, would be liable to lien for it notwithstanding the conveyance express the consideration to have been paid, and there is an indorsed receipt. S. C.; *Winter v. Anson*, 3 Russ. 488. See notes to *Mackreth v. Symmons*, 1 White & T. Lead. Cases. But now in case of deeds executed after 31st December, 1881, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 55, provides that "a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." In general, a receipt not under seal is only a *prima facie* acknowledgment that the money has been paid; and therefore may be contradicted or explained. *Graves v. Key*, 3 B. & Ad. 318. Even though expressed to be "in full of all demands;" *Fitch v. Sutton*, 5 East, 230; *Lee v. Lancashire and Yorkshire Ry. Co.*, L. R., 6 Ch. 527, 534; see also *Bowes v. Foster*, 2 H. & N. 779; 27 L. J., Ex. 262. These two last cases overrule *Alner v. George*, 1 Camp. 392, *cor. Ld.* Ellenborough. See further notes to *Cumber v. Wane*, 1 Smith's L. Cases. A receipt given in the settlement of an account may be evidence of sums being allowed on the settlement, and such allowance being equivalent to the payment of money cannot be afterwards recovered by the person making the allowance. *Bramston v. Robius*, 4 Bing. 11. As between the underwriter and the assured, the acknowledgment in the policy of the receipt of the

premium by the broker is conclusive; *Dalzell v. Mair*, 1 Camp. 532; and see *Xenos v. Wickham*, L. R., 2 H. L. 296, 319; unless there was a fraud practised by the assured to induce the broker to give credit to him. *Foy v. Bell*, 3 Taunt. 493. If an agent employed to receive money, and bound by his duty to his principal to communicate to him whether the money is received or not, renders an account from time to time which contains an intentional misstatement that the money has been received, he is so far bound by that account that he cannot make his principal refund moneys paid to him on it. *Shaw v. Picton*, 4 B. & C. 729; *Skyring v. Greenwood*, Id. 281. As to proof of receipts for legacies, *vide post*, tit. *Stamps*; *Receipt*.

[*Admissions implied from the acts of the party.*] The plaintiff's title to sue, or the character in which the plaintiff sues, or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party; and in some cases the admission, though not strictly an estoppel, is conclusive. Thus, if B. has dealt with A. as farmer of the post-horse duties, it is evidence in an action by A. against B. to prove that he is such farmer. *Radford v. McIntosh*, 3 T. R. 632. And see *Peacock v. Harris*, 10 East, 104. So in an action for slandering the plaintiff in his profession of an attorney, the words themselves, importing that the defendant would have the plaintiff struck off the roll of attorneys, were held to be an admission of the plaintiff's character of attorney. *Berryman v. Wise*, 4 T. R., 366; *Pearce v. Whale*, 5 B. & C. 38. So in the case of a libel on the plaintiff as envoy of a foreign state; *Yrisarri v. Clement*, 3 Bing. 432. In an action for penalties against a collector of taxes, proof of the defendant having collected the taxes is sufficient proof of his being collector, though the appointment is by warrant. *Lister v. Priestley*, Wightw. 67. So payment of tithes by a parishioner to the plaintiff is evidence against the former of the plaintiff's title to the living. *Chapman v. Beard*, 3 Anstr. 942. Where an auctioneer has advertised for sale the "property of J. S., a bankrupt," this is evidence of the bankruptcy in an action brought by the trustee against the auctioneer for the proceeds. *Maltby v. Christie*, 1 Esp. 340. The cases relating to the admission of bankruptcy, and of the title of the trustees, by matters *in pais*, are collected, *post*, Part III., tit. *Actions by trustees of bankrupts*; *Proof of title of trustee, when dispensed with by implied admission*.

Where A. brings an action against B. to recover possession of land, he thereby admits B.'s possession of the land. *Stanford v. Hurlstone*, L. R., 9 Ch. 116.

Mere subscription of a paper, as witness, is not in itself proof of his knowledge of its contents. *Harding v. Orelthorn*, 1 Esp. 58.

As to estoppel arising from the acts of a party, *vide post*, p. 73.

[*Admission by trustees; or of persons not parties to the suit, but interested in it.*] An admission is evidence whether made by a trustee, or nominal party, who sues for the benefit of another; *Bauerman v. Radenius*, 7 T. R. 664; *Gibson v. Winter*, 5 B. & Ad. 96; or by husband in action by him and his wife; *Moriarty v. L., Chatham, & Dover Ry. Co.*, L. R. 5 Q. B. 314; cited *ante*, p. 59; or by the person really interested in the suit, but not named on the record. Thus in action on a bond conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence against plaintiff. *Hanson v. Parker*, 1 Wils. 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the latter are evidence. *Smith v. Lyon*, 3 Camp. 465. So in actions on policies, the declarations of the party really interested are admissible. *Per Lord Ellenborough*, *Bell v. Ansley*, 16 East, 143. But the statement of a *cestui que trust* is either wholly inadmissible against his trustee, or admis-

sible only as to his own interest, where the trustee holds in trust not for him only, but for others. Thus where an action of ejectment was brought by a trustee having the legal estate in fee, and the defendant offered evidence of admissions made by the *cestui que trust* of a particular estate, it was considered doubtful whether such evidence could be received, inasmuch as the interest of the *cestui que trust* was not co-extensive with that of the lessor of the plaintiff, and the declarations were prejudicial to the remainderman. *Doe d. Rowlandson v. Wainwright*, 8 Ad. & E. 691. And according to *May v. Taylor*, 6 M. & Gr. 261, in order to make the statements of the *cestui que trust* admissible against the trustee, the interest of the *cestui que trust* ought to be identical with that of the trustee, and it is not enough to prove a subsisting trust without showing the nature and extent of it, or that the *cestui que trust* is the real party to the action, and the nominal party a mere agent. It is said in B. N. P. 237, that an "answer" by a trustee can in no case be used as evidence against a *cestui que trust*. It is, however, probable that this passage relates to evidence in equity; for it was there only that a *cestui que trust* could be party to the suit, and the trustee would be a co-defendant.

Admissions by tenants of the existence of rights or easements are not evidence against their landlords. *Papendick v. Bridgwater*, 5 E. & B. 166; 24 L. J., Q. B. 289. But where, in an action of ejectment, one of the defendants defended, in the character of landlord to the other defendants, their admissions were evidence against him. *Doe d. Mee v. Litherland*, 4 Ad. & E. 784.

On an appeal against an order of removal, the admissions of rated inhabitants of a parish are evidence against that parish, for they are the parties really interested. *R. v. Whitley*, 1 M. & S. 636. So in an action against the sheriff, the declarations of a party, who has indemnified the sheriff, are evidence against the defendant. *Dyke v. Aldridge*, cited 7 T. R. 665. So in trover for a deed, which the defendant detained at the request of W., and in the detainer of which W. was substantially interested, the declarations of W. in favour of the plaintiff's claim were held admissible. *Harrison v. Vallance*, 1 Bing. 45; and see *Robson v. Andrade*, 1 Stark. 372. So the declarations of the party for whose benefit the plaintiff sues on a bill; *Welstead v. Levy*, 1 M. & Rob. 138; or of a party from whom he received the bill or note when overdue, are evidence against the plaintiff. *Beauchamp v. Parry*, 1 B. & Ad. 89. Admissions by one of several trustees will not affect his co-trustees where they are not all personally liable. *Davies v. Ridge*, 3 Esp. 101.

The declarations of a party proved to be a joint contractor with the defendant, though not joined in the action, or though *not-pressed* on a plea of bankruptcy, were admissible. *Grant v. Jackson*, Peake, 203; *Wood v. Braddick*, 1 Taunt. 104. But admissions by co-trespassers, or joint defendants, in actions for *tort*, are not generally evidence except against themselves, unless there be proof of common motive and object, and the declarations relate to them. *Daniels v. Potter*, M. & M. 501; and see the observations in *R. v. Hardwick*, 11 East, 578. Nor are they evidence in actions *ex contractu*, unless they relate to a matter in which there is an identity of interest: thus where the plaintiff in covenant alleged an eviction by two defendants under a prior lawful title, an admission by one of the defendants after eviction was held no evidence of such title, although the defendants were co-executors of the covenantor, and had joined in the eviction. *Fox v. Waters*, 12 Ad. & E. 43.

An admission by a private individual of a corporation is not evidence against the corporate body. *London, Mayor of, v. Long*, 1 Camp. 23. But where a corporation sues for a disturbance in exercising a corporate office, what is said by the officer respecting the exercise of it is evidence against the

corporation. *Id.* 25 per *Ld. Ellenborough*. As to admissions by the agents of corporations and companies, see *Admissions by agents*, *post*, pp. 67, 68.

Where plaintiff sued as administrator *durante absentia* of the executor, the admissions of the executor were held inadmissible against the plaintiff. *Rush v. Peacock*, 2 M. & Rob. 162. In a suit by assignees of bankrupt, admissions by them before their appointment were received in evidence against them by *Tindal, C. J.*, in *Smith v. Morgan*, *Id.* 257; but they were rejected in a previous case of *Fenwick v. Thornton*, M. & M. 51. In *Legge v. Edmonds*, 25 L. J., Ch. 125, letters written by a defendant, sued as administratrix, containing admissions made by her before letters of administration had been taken out, were rejected as evidence, against her. Perhaps the admissibility of statements made by executors, assignees, and others filling an official character, but before they were invested with that character, will be found to depend on the nature of the facts stated by them. So an admission, before probate, by an executor named in a will may perhaps be entitled to more consideration than the admission of a mere stranger who has afterwards obtained letters of administration. When an official manager of a company, appointed under the Winding-up Act, 11 & 12 Vict. c. 45, was substituted as defendant by order in Chancery, instead of a shareholder D., who had been sued by a creditor of the company "as nominal defendant," it was held that the declarations of D., while defendant, were not evidence against the official manager. *Armstrong v. Normandy*, 5 Exch. 409. The decision here turned on the misnaming of D. on the record as "nominal defendant only."

Admissions by guardian and prochein amy.] The admissions of a guardian are not evidence against an infant who sues by his guardian. *Cowling v. Ely*, 2 Stark. 366; *Eggleston v. Speke*, 3 Mod. 258. Nor the admission of *prochein amy*. *Webb v. Smith*, Ry. & M. 106.

Admissions by agents and servants.] Where a party to the suit directly or impliedly constitutes a third person his agent for the purpose of an admission, the admission so made is evidence. Thus, if a person agrees to admit a claim, provided J. S. will make an affidavit in support of it, such affidavit is proof against him. *Lloyd v. Willan*, 1 Esp. 178; *Stevens v. Thacker*, Peake, 187. And it is conclusive in an action founded on the special agreement. *Amy v. Andrews*, Freem. 133. But see *Garnet v. Ball*, 3 Stark. 160. So if the vendee of goods denies having received them, but adds, "If the carrier's servant says he delivered the goods, I will pay you," the answer of the servant when applied to on the subject may be given in evidence. *Daniel v. Pitt*, 1 Camp 366, n.; *Williams v. Innes*, *Id.* 364. In an action for the loss of a horse through the defendant's negligence in not fencing a shaft, defendant consented to pay compensation if a miners' jury should say the shaft was his; held that the finding of such jury was evidence against him of negligence, though not conclusive. *Sybray v. White*, 1 M. & W. 435.

With regard to the admissions of agents in general, the rule is this: When it is proved that A. is agent of B. whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence against B., because it is part of the contract which he makes for B., and which therefore binds B.; but it is not admissible merely as the agent's account of what has passed. *Per Gibbs, J.*, *Langhorn v. Allnutt*, 4 Taunt. 519. Thus the declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but statements made at any other time are not admissible against him. *Helyear v. Hawke*, 5 Esp. 72. So where the servant of a horsedealer, who was employed to take a

horse to the stables of the purchaser, had signed a receipt containing a warranty, this receipt without proof of the servant's authority to give a warranty was rejected in an action against his master. *Woodin v. Burford*, 2 Cr. & M. 391. An admission by a servant, in a transaction not relating to the business in which he is employed, is not evidence against his master. Thus where a pawnbroker's shopman was heard to state that his master had lent 200*l.* at 5 per cent. on the security of certain plate, this was held inadmissible as against the master. *Garth v. Howard*, 8 Bing. 451. But if the statement had been made by him in the course of a transaction in the ordinary course of a pawnbroker's business, it would have been different. *Id.* 543; *Schumack v. Lock*, 10 B. Moo. 39. The letters of an agent to his principal, containing a narrative of past transactions in which he had been employed, are not admissible in evidence against the principal. *Kahl v. Jansen*, 4 Taunt. 565; *Fairlie v. Hastings*, 10 Ves. 128; *Betham v. Benson*, Gow. 45. An admission by a person who has generally managed A.'s landed property, and received his rents, is not evidence against A. as to his employer's title, there being no other proof of his agency *ad hoc*. *Ley v. Peter*, 3 H. & N. 101; 27 L. J., Ex. 239. So in an action against a surety, the admissions or declarations of the principal, to whom goods have been sent by the plaintiff at the defendant's request, are not evidence against the defendant either as to the receipt of the goods, or as to other facts respecting them. *Evans v. Beattie*, 5 Esp. 26; *Bacon v. Chesney*, 1 Stark. 192.

But a letter from an agent abroad stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal. *Coates v. Bainbridge*, 5 Bing. 58. The admissions of an under-sheriff are evidence against a sheriff, for he is the general agent of the sheriff; *Drake v. Sykes*, 7 T. R. 117; but not unless they accompany an act done, or they tend to charge himself; he being the real party in the cause. *Snowball v. Goodricke*, 4 B. & Ad. 541. The admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, only when they form part of the transaction. *North v. Miles*, 1 Camp. 389.

The admissions of a surveyor of a corporation respecting a house belonging to the corporation, are evidence against the latter in an action for an injury to the plaintiff's house by works done on the defendants' premises. *Peyton v. S. Thomas's Hospital*, 3 M. & Ry. 625, n.; and see *London, Mayor of, v. Long*, 1 Camp. 25, cited *ante*, p. 65; and *R. v. Adderbury, East*, 5 Q. B. 187. Evidence may be given against companies, of admissions made by their directors or agents relating to matters within the scope of their authority. In *Meux's Executors' case*, 2 D. M. & G. 522, a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M., was admitted on behalf of his executors, in proceedings against them. See also *National Exchange Co. of Glasgow v. Drew*, 2 Macq. 103. The secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admissions; *Burnside v. Dayrell*, 3 Exch. 225. In *Bruff v. Gt. N. Ry. Co.*, 1 F. & F. 345, Willes, J., rejected an admission of the secretary of a company as to the receipt of a letter. And an admission by the board meeting of a company registered under 7 & 8 Vict. c. 110, consisting of a less number of directors than was required by the deed of settlement, was rejected in *Ridley v. Plymouth Banking Co.*, 2 Exch. 711. In an action against an incorporated company by one of its members on a bond, entries in a book kept by the clerk of the company, to which all members by the act of incorporation had access, cannot be used against the plaintiff as an admission. *Hill v. Manchester, &c. Waterworks Co.*, 5 B. & Ad. 866. Admissions by servants of a company as to the ferocious habits of a dog, were not allowed to bind the

company, in the absence of evidence that these servants had the care of the animal. *Stiles v. Cardiff S. Navigation Co.*, 33 L. J., Q. B. 310. As to admissibility of statements by servants of a railway company with reference to delay in delivery or loss of goods, see *Gt. W. Ry. Co. v. Willis*, 18 C. B., N. S. 748; 34 L. J., C. P. 195; and *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468, cited *post*.

Before the admissions of an agent can be received, the fact of his agency must be proved. This can be done by proving that the agent has acquired credit by acting in that capacity, and that he has been recognised by the principal in other instances of a similar character to that in question. In *Watkins v. Vince*, 2 Stark. 368, a guarantee signed by a son for his father was admitted upon proof of the son having signed for his father upon three or four previous occasions. But in *Courteen v. Touse*, 1 Camp. 43, n., where, in an action upon a policy, a witness proved that he had often seen B. sign policies for the defendant, but was not acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, it was held that the agency was not sufficiently proved.

A receipt for debt and costs, indorsed by the plaintiff's solicitor's town agent on a writ of summons, is evidence of payment against the plaintiff, without further proof of agency. *Weary v. Alderson*, 2 M. & Rob. 127. Where the statements of a party's agent are admissible, the statements of the agent's interpreter, made while acting as such in the agent's presence, may be given in evidence, without calling the interpreter. *Reid v. Hoskins*, 5 E. & B. 729.

Admissions by partner.] After *prima facie* evidence of partnership, the declaration of one partner is evidence against his co-partners as to partnership business; *Nicholls v. Dowding*, 1 Stark. 81: though the former is no party to the suit. *Wood v. Braddick*, 1 Taunt. 104; but see *Rooth v. Quin*, 7 Price, 198. And it is evidence, though made after the dissolution of partnership, if made as to a transaction which took place before the dissolution; *Wood v. Braddick*, *supra*; but not so as to bind his co-partner as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. *Catt v. Howard*, 3 Stark. 3. Admissions made by one of several partners after the dissolution of the partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership. *Pritchard v. Draper*, 1 Russ. & Myl. 191. A declaration by one of several partners, joint plaintiffs, that goods, the subject-matter of the suit, were his separate property, is evidence against all the plaintiffs; *Lucas v. De la Cour*, 1 M. & S. 249; but an admission by a partner as to a subject, not of co-partnership, but of joint ownership, of a vessel, is not admissible against his co-partner. *Jaggers v. Binnings*, 1 Stark. 64. In an action against two partners on a deed purporting to be executed by one defendant "for self and partner," a subsequent acknowledgment of the deed by the other defendant was held not evidence to prove the actual execution by him, without producing the authority under seal. *Steiglitz v. Eggington*, Holt, N. P. 141. But see *Ball v. Dunsterville*, 4 T. R. 313, *post*, p. 128. And in *Harvey v. Kay*, 9 B. & C. 366, letters of a member of a joint stock company, admitting that he was a partner in it, were received as proof of that fact, without any evidence of his having executed the deed of settlement by which the company was formed. A statement by one who became partner after the cause of action arose, is not evidence against his co-partner, who sues on it. *Tunley v. Evans*, 2 D. & L. 747, B. C., Wightman, J.

Admissions by wife.] In general, the admissions of a wife will not affect

the husband. Thus, the wife's receipt for money, or admission of a trespass, is not evidence against the husband. *Hall v. Hill*, 2 Stra. 1094; *Denn v. White*, 7 T. R. 112. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. *Emerson v. Blonden*, 1 Esp. 142; *Anderson v. Sanderson*, 2 Stark. 204; S. C., Holt, N. P. 591. Thus, in an action for goods sold and delivered at the defendant's shop, an offer made by his wife to settle the demand, is admissible in evidence, if she was accustomed to serve in the shop, and to transact the business in her husband's absence; *Clifford v. Burton*, 1 Bing. 199; and her admission, under such circumstances, will take a case out of the Statute of Limitations. *Paethorp v. Furnish*, 2 Esp. 511, n. But her admissions are not evidence of the terms of her husband's tenancy of the shop, in a suit for the rent, although she is carrying on business in it by her husband's authority in his absence. *Meredith v. Footner*, 11 M. & W. 202. A wife's declaration that she agreed to pay 4s. a week for nursing a child will charge the husband: it being a matter usually transacted by women. *Anon.*, 1 Stra. 527. In an action against defendant, as administrator of his wife, for money lent to her before marriage, admissions of the debt made by her during coverture are evidence. *Per* Lord Tenterden, C. J., *Humphreys v. Boyce*, 1 M. & Rob. 140. But in an action by husband and wife for a loan by the wife *dum sola*, her admissions, after coverture, negating the debt, were refused by Lord Kenyon, C. J. *Kelly v. Small*, 2 Esp. 716. So, where plaintiff sued, with his wife as executrix, her declarations were inadmissible. *Alban v. Pritchett*, 6 T. R. 680. A joint answer in Chancery by husband and wife is not evidence against her, being considered as the answer of the husband alone. *Elston v. Wood*, 2 My. & K. 678. In *Shelberry v. Briggs*, 2 Vern. 249, in a bill against husband and wife for payment of a legacy under a will, of which the wife was executrix, the answer was admitted against the wife after the death of her husband. See *Wrottesley v. Bendish*, 3 P. Wms. 238. In the case of a wife sued, with her husband, in respect of her separate estate, it would seem that her admissions, but not those of her husband, would be evidence against her. Where the conduct of the wife is in question, her declarations have in some cases been held admissible for her husband, in an action against him. Thus, in an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery, made previously to her expulsion, were admitted by Abbott, C. J.; *Walton v. Green*, 1 C. & P. 621; this decision, however, as reported, seems unsatisfactory. See 1 Taylor, Evid., § 695. In an action for seduction, declarations of defendant's wife, tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, were admitted as evidence in aggravation. *Per* Gurney, B. *Knowles v. Compigne*, Winton Sum. Ass. 1835.

Admissions by counsel or solicitor.] In *Colledge v. Horn*, 3 Bing. 122, Burrough, J., expressed an opinion, that if one of the parties to a cause was in Court and had heard an admission made by his counsel in his opening statement, this was evidence against him. In *Haller v. Worman*, 2 F. & F. 165, where, in an action of detinue, it was proved that the defendant's counsel had stated, while attending a summons at chambers, that his client had the papers in his possession; this was admitted at the trial, to negative the plea of "not possessed." When the counsel in a cause so conducts it as to lead to an inference that a certain fact is admitted by him, the jury may take it as proved; *Stracy v. Blake*, 1 M. & W. 168; and the judge is also warranted in acting upon such tacit admission. *Semble*, *Doe d. Child v. Roe*, 1 E. & B. 279. So, where a fact is assumed at *Nisi Prius* for the purpose of sup-

porting one issue, it must be taken as admitted for the purpose of disproving another issue. *Semble, Bolton v. Sherman*, 2 M. & W. 403. And if counsel for the plaintiff open a fact from which his client's possession of a document may be presumed (as payment of a cheque), though he offers no proof of it, yet defendant may give secondary evidence of it after notice to produce, without further proof of the plaintiff's possession. *Duncombe v. Daniell*, 8 C. & P. 222. Where after a verdict subject to a special case a new trial has been directed, the special case, signed by counsel on both sides, is evidence of the facts there stated. *Van Wart v. Wolley*, Ry. & M. 4. In a case where the statement of counsel as to the limitations of a deed on a former trial was offered as secondary evidence of its contents, the admissibility of it was considered questionable, even if the parties had been the same; but it was rejected on the ground that the defendant, against whom it was offered, was different. *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

An admission made by the solicitor of one of the parties to prevent the necessity of proving a fact on the trial is sufficient evidence of that fact; *Young v. Wright*, 1 Camp. 141; as where he admits the handwriting of an attesting witness. *Milward v. Temple*, *Id.* 375; and see *Trustlove v. Burton*, 9 B. Moore, 64. See also Rules, O. xxxii. r. 1, cited *ante*, p. 60.

Admissions made by the defendant's solicitor, when making proposals on behalf of his client respecting the plaintiff's demand (the solicitor refusing to be examined), are evidence against the defendant; and proof that they were made by the solicitor on the record will be sufficient to establish his agency. *Gainsford v. Grammar*, 2 Camp. 9. But an admission made in a letter written by a solicitor (who was afterwards the solicitor in the cause) before the commencement of the action, is not evidence against the defendant, without some proof of his having authorized the communication. *Wagstaff v. Wilson*, 4 B. & Ad. 339; *Ley v. Peter*, 3 H. & N. 101, 111; 27 L. J., Ex. 239, 242, *per* Watson, B. See also *Blackstone v. Wilson*, 27 L. J., Ex. 229. And an admission made in the course of conversation between the two solicitors respecting the cause, but not with a view to dispense with proof, cannot be given in evidence. *Petch v. Lyon*, 9 Q. B. 147. See *Parkins v. Hawkshaw*, 2 Stark. 239. An undertaking to appear for "Messrs. T. and M., joint owners of the sloop A.," given by the solicitor on the record, is evidence of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. An agreement by the solicitor "to admit on the trial of this cause," &c., may be used on a new trial; *Elton v. Larkins*, 1 M. & Rob. 196; even though the solicitor retracts it before the new trial. *Doe d. Wetherell v. Bird*, 7 C. & P. 6.

[*Admission under a notice to admit.*] By Rules, 1883, O. xxxii. r. 2, "Either party may call upon the other party to admit any document, saving all just exceptions: and in case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense." By rule 4, "Any party may, by notice in writing, at any time not later than 9 days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within 6 days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or

a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purpose of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice : provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just." By rule 7, "An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts shall be sufficient evidence of such admissions if evidence thereof be required."

It would seem that "sufficient evidence," in rule 7, means *prima facie* evidence only ; see *Barraclough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch., *post*, p. 141.

The above provision as to a notice to admit facts is new : forms of such notice and of admissions thereunder are given by rule 5 and App. B., Forms Nos. 12, 13. A form of notice to admit documents is given by rule 3, and App. B., Form No. 11 ; but this form is only applicable where the document is in the custody of the party giving the notice. See *Rutter v. Chapman*, 8 M. & W. 388. Prior to R. G. H. T. 1853, r. 29, which gave a form identical with the above, by rule H. T. 4 W. 4, a judge's order to admit was required. The judge is not now called upon to interfere except on application for a certificate by the refusing party at the trial, and only in such case need the notice to admit be proved.

The above provisions apply to every document a party means to adduce in evidence, and are not confined to documents in his custody or control ; *Rutter v. Chapman*, *supra* ; in which case the costs of proving signatures to a petition for a charter, under 1 Vict. c. 71, s. 49, were not allowed, no notice to admit having been given. It seems that "any document" includes a foreign judgment. *Smith v. Bird*, 3 Dowl. 641.

It was held under the old rules that a variation in the description of the instrument, if not of a nature to mislead, would not release the party from the obligation to admit it ; as where the date of a bill, annexed to the order, was misdescribed. *Field v. Flemming*, 5 Dowl. 450 ; *Bittleston v. Cooper*, 14 M. & W. 399. And where the order was to admit "the counterpart of a lease," and the instrument produced, and referred to in the order, was in fact an original lease stamped as a counterpart : held, that the party was bound to admit the lease, and could not object to the stamp. *Doe d. Wright v. Smith*, 8 Ad. & E. 255. An order to admit an acceptance "by B., for the defendants," was held to operate as an admission that B. had power to accept for defendants. *Wilkes v. Hopkins*, 1 C. B. 737. So an admission of letters written by A., "the agent of the defendant," is an admission of the agency. *Hunt v. Wise*, 1 F. & F. 445. The admission by judge's order was held to waive any objection to interlineations in the document. *Freeman v. Steggall*, 14 Q. B. 202. An admission of an acceptance of a bill, without a saving of all just exceptions, dispenses with the necessity of producing the bill on the trial. *Chaplin v. Levy*, 9 Exch. 531 ; 23 L. J., Ex. 117. But see *Sharples v. Rickard*, 2 H. & N. 57 ; 26 L. J., Ex. 302. If that saving had not been omitted, the bill must have been produced, and the want of a stamp might have been objected to. *Vane v. Whittington*, 2 Dowl. N. S. 757. A saving of "just exceptions" does not allow exceptions to the authenticity of any part of letters admitted. *Hawk v. Freund*, 1 F. & F. 295, Byles, J.

The party must serve the proper notice, although the document may be alleged by the opposite party, in his pleadings or otherwise, to be a forgery, and although the opposite party may have notified his intention *not* to

admit it. *Spencer v. Barough*, 9 M. & W. 425. Admissions made under the above provision are, of course, conclusive at the trial; but facts incidentally stated in the description of the document as admitted, are not to be taken as also conclusively admitted, though the description may be *prima facie* evidence against the party admitting. *Pilgrim v. Southampton & Dorchester Ry. Co.*, 18 L. J., C. P. 330. The description of a letter respecting a certain field, "then in the plaintiff's possession," was admitted as evidence, but not conclusive, of such possession. S. C. This decision seems to qualify some of those cited above.

The party called upon to make admissions should be cautious not to admit more than the mere document mentioned in the notice, and to guard against being inadvertently drawn into admissions of the kind referred to in *Wilkes v. Hopkins*, *Hunt v. Wise*, and *Pilgrim v. Southampton & Dorchester Ry. Co.*, *supra*.

An admission, under notice, of the accuracy of a copy, will not dispense with notice to produce the original, or with other pre-requisites for the reception of secondary evidence. See *Sharpe v. Lamb*, 11 Ad. & E. 805.

Admissions by payment of money into court.] The practice as to payment of money into court is now regulated by Rules, 1883, O. xxii. By rule 1, the defendant may, in any action brought to recover a debt or damages, "pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may with a defence denying liability (except in actions or counter-claims for libel or slander) pay money into court, which shall be subject to the provisions of rule 6, provided that in an action or bond under the statute, 8 & 9 Will. III. c. 11, payment into court shall be admissible to particular breaches only, and not to the whole action." By rule 2, "payment into court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein." By rule 9, "a plaintiff may in answer to a counter-claim pay money into court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into court by a defendant."

Before the J. Acts, the question was often raised as to how far payment into court operated as an admission of the plaintiff's claim; under the new practice, however, the cases decided on this point will hardly be relevant.

By Rules 1883, O. xix., r. 13, every allegation of fact in any pleading, "if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition." By rule 14, "any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." By rule 15, each party must raise "by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or Statute of Frauds." By rule 17, "it shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff

in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages." O. xxi., r. 4, provides that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted."

The effect of these rules would seem to be that where the payment into court is less than the amount of the plaintiff's claim, the facts which will be relied on as a defence to the residue of the claim, if divisible, or in mitigation of damages if indivisible, must distinctly appear in the defendant's statement of defence. Even before the J. Acts in an action for money had and received by a rightful against a wrongful executor to recover assets in his hands, defendant could not, on a plea of payment into court alone, deduct payments in due course of administration. *Goldy v. Goldy*, 26 L. J., Ex. 29.

As to the effect of paying money into court under 6 & 7 Vict. c. 96, s. 2, see *Jones v. Mackie*, L. R., 3 Ex. 1; cited *post*, tit. *Action for defamation*.

Admissions by recital.—Estoppel.] A recital in a deed is evidence against him who executed the deed, or any person claiming under him. Com. Dig. Evid. (B. 5). And such recital operates as an estoppel in an action founded on the deed; *Carpenter v. Buller*, 8 M. & W. 212; unless the parties in their pleading voluntarily waive it, and instead of replying the estoppel, submit the fact recited to a jury. *Young v. Raincock*, 7 C. B. 310. Thus the recital of a lease in a release is evidence of the lease against the releasor, and those claiming under him. *Ford v. Grey*, 1 Salk. 286; *Crease v. Barrett*, 1 C. M. & R. 919. But in order to create an estoppel, the deed must contain a precise statement of the fact relied on; e. g., in a grant of land by A., that A. was seised of the legal estate: a covenant that the grantor had power to grant is insufficient. *General Finance, &c., Co. v. Liberator, &c., Building Soc.*, 10 Ch. D. 15. Where the recital in a lease has ceased to be an estoppel in consequence of its dropping, it continues to be *prima facie* evidence against those who claim under the parties to it. *Bayley v. Bradley*, 5 C. B. 396. In trespass against a sheriff, a bill of sale executed by him, reciting the writ, the taking, and the sale of the goods, is evidence against him of those facts. *Woodward v. Larking*, 3 Esp. 286. So the recital of an ancient royal charter in a modern charter is evidence. *Per Abbott, J., Gervis v. Gd. W. Canal Co.*, 5 M. & S. 78. The recitals in a deed may confine the effect of admissions in the same instrument. *Lampon v. Corke*, 5 B. & A. 607. But the recital in a bond, that the parties had agreed to execute a bond in the sum of 500*l.*, will not confine the bond to that sum, if actually executed in the penal sum of 1000*l.* *Ingleby v. Swift*, 10 Bing. 84. A party claiming under a certain title does not necessarily admit statements in previous deeds which make up his title; thus, where a deed, reciting the bankruptcy of A., conveys an estate to B., and B. (being a party to, but not having executed that deed) conveys the estate to another by a deed making no such recital, the above deeds are no evidence of the bankruptcy as against B. in an action concerning other lands. *Doe d. Shelton v. Shelton*, 3 Ad. & E. 265. A recital is not necessarily an estoppel to both parties unless the mutuality appears; if it is the statement of one party only, it estops only that party. *Stroughill v. Buck*, 14 Q. B. 787. Where the recital in a deed is used as an admission, it must be proved strictly, although cancelled; *Bretton v. Cope*, Peake, 44; and a recited instrument is only admitted for so much as is recited; if any other part of it is to be proved, it must be produced and proved in the usual way. *Gillett*

v. *Abbott*, 7 Ad. & E. 783. See further as to estoppels by deed, notes to *Kingston's (De. of) case*; 2 Smith's L. Cases, 8th ed. 872, *et seq.*

Admissions by Estoppel in pais.] There is a class of cases in which a party may be estopped or precluded by his wilful misstatement in *pais* from disputing a state of things upon the faith of which another party has been induced to act or to rely to his own prejudice. The case of *Shaw v. Picton*, 4 B. & C. 729, cited *ante*, p. 64, is an instance. So the cases of *Pickard v. Sears*, 6 Ad. & E. 469; *Gregg v. Wells*, 10 Ad. & E. 90; *Freeman v. Cooke*, 2 Exch. 654, established the doctrine that a voluntary misstatement of fact by A.,—such as a misrepresentation of the property in goods, whereby a party, B., is deceived,—precludes A. from denying such property in a suit between A. and B. See on the principle of these cases, *Foster v. Mentor Life Insur. Co.*, 3 E. & B. 48; 23 L. J., Q. B. 145; *Clarke v. Hart*, 6 H. L. C. 633, 655; 27 L. J., Ch. 615, 618; and the cases further cited, *post*, tit. *Action for conversion of goods*; *Denial of plaintiff's possession*. And this doctrine has been extended to the case of a sale where the defendant has so conducted himself as unintentionally to induce a belief in the plaintiff that defendant had bought the goods. *Cornish v. Abington*, 4 H. & N. 549; 28 L. J., Ex. 262. So where a negotiable security is intrusted by the owner to an agent for a specific purpose, any innocent transference for value from the agent acquires a good title against the owner; *Goodwin v. Roberts*, 1 Ap. Ca. 476, D. P.; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194. The propositions on estoppel in *pais* are summed up in the judgment in *Carr v. L. & N. W. Ry. Co.*, L. R., 10 C. P. 307. There must be a representation of a fact, a statement of intention is not sufficient. *Citizen's Bank of Louisiana v. First National Bank of New Orleans*, L. R., 6 H. L. 352. The misstatement or negligence whereby the other person is injured must be the proximate cause of the injury; *In re United Service Co.*, L. R., 6 Ch. 212; *Bazendale v. Bennett*, 3 Q. B. D. 525, C. A.; *Swan v. N. British Australasian Co.*, 7 H. & N. 603; 31 L. J., Ex. 425; 2 H. & C. 175; 32 L. J., Ex. 273, Ex. Ch.; and the negligence must be of some duty owing to him. S. C.; *Johnson v. Crédit Lyonnais Co.*, 3 C. P. D. 32, C. A. See also *Arnold v. Cheque Bank*, 1 C. P. D. 578, and *Coventry v. Gl. E. Ry. Co.*, 11 Q. B. D. 776. As to an estoppel arising from silence, see *McKenzie v. British Linen Co.*, 6 Ap. Ca. 82, D. P. Where a company issue share or debenture certificates, stating that a certain person is the holder of the shares or debentures, or where they register shares in his name, this may operate as an estoppel against the company; see *post*, Part III. *Actions by and against companies*. See further as to estoppels in *pais*, 2 Smith's L. Cases, 8th ed. 879, *et seq.*

Admissions of the title of a person to land by accepting a tenancy, or possession of land from him, are considered *post*, *Action for recovery of land*—*Proof of legal title—Estoppel*.

Admissions on the record.] The rule, O. xix., r. 13, *ante*, p. 72, follows in the main the old common law rule. See B. N. P. 298; *Wimbish v. Tailbois*, Plowd. 48; *Tonkin v. Crocker*, 2 Lutw. 1215. But rule 15, which requires the Stat. of Frauds to be pleaded, goes much further.

It has been considered that a fact admitted on the pleadings by implication is not in every respect on the same footing as if it had been proved to the jury. Thus, if the defendant pleads that a note originated in a gaming debt, and that plaintiff took it with knowledge and without consideration, and plaintiff denies any knowledge of the illegality, it has been held that he need not prove the consideration unless the defendant proves the illegality. *Edmunds v. Groves*, 2 M. & W. 642. But in *Bingham v. Stanley*, 2 Q. B. 117, where the plea to a cheque stated an original illegal

transaction and transfer to the plaintiff without consideration, to which the plaintiff replied a good consideration, on which issue was joined, the Ct. of Q. B. held that such admission on the record put the plaintiff on proof of consideration, and they dissented from the doctrine laid down by the Ct. of Exch. in the above case, viz., that facts admitted in the pleadings are not to be taken as if proved to the jury. Since the decision of this case the Ct. of Exch. have in *Smith v. Martin*, 9 M. & W. 304, expressed their adherence to their former opinion; and in *Fearn v. Filica*, 7 M. & Gr. 513, observations made by the Ct. of C. P. in argument seem to countenance the doctrine of the Exch. In *Robins v. Maidstone, Vt.*, 4 Q. B. 815, Ld. Denman, C. J., corrected the language attributed to the Ct. of Q. B. in *Bingham v. Stanley*, *supra*, and laid down the rule that admissions in pleading of material allegations are to be taken as made for all purposes in the cause "regarding the issue arising from that pleading." This qualification will, perhaps, be found to reduce the difference of opinion between the courts. And in *Carter v. James*, 13 M. & W. 144, Alderson, B., expressed his opinion that *Bingham v. Stanley*, *ante*, p. 74, was rightly decided, though he could not agree with the reasons given. See also *Lewis v. Parker*, 4 Ad. & E. 838. See further on the point, *Blewett v. Tregonning*, 3 Ad. & E. 554, 579, 583; *Cowlshaw v. Cheslyn*, 1 C. & J. 48; *Cooke v. Blake*, 1 Exch. 220; and *Boileau v. Rutlin*, 2 Exch. 665.

It seems that statements made by parties in the course of their pleadings in another action are not to be used as admissions by them in a subsequent action, except where they are estoppels. As several claims or defences are often put in, contradictory admissions might be proved, if such evidence were allowed. *Semble, Boileau v. Rutlin*, *arg.*, 2 Exch. 665. See also *Carter v. James*, 13 M. & W. 137. A plea in a discontinued action was not evidence against the defendant in another action. *Allen v. Hartley*, 4 Doug. 20.

Suffering a judgment by default is an admission on the record of the cause of action. Thus in an action against the acceptor of a bill, the defendant, by suffering judgment by default, admits a cause of action to the amount of the bill, unless part payment be indorsed. *Green v. Hearne*, 3 T. R. 301. So in an action on a contract the defendant cannot, after judgment by default, insist upon the fraud of the plaintiff. *E. India Co. v. Glover*, 1 Stra. 612.

[*Whole admission to be taken together.*] The whole of an admission must be taken together; therefore, where an account rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account. *Randle v. Blackburn*, 5 Taunt. 245; *Thomson v. Austen*, 2 D. & Ry. 361. But the jury are not bound to believe both sides of the account; therefore, where the plaintiff put in evidence an account rendered by the defendant in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter-claim, and to recover the amount admitted. *Rose v. Savory*, 2 N. C. 145. And see *Bairdon v. Walton*, 1 Exch. 617, cited *post*, *Actions on contract*; *Defences*; *Statutes of Limitation*. Where the plaintiff puts in the defendant's answer in Chancery to prove an admission, defendant has a right to have the bill read, but the judge will caution the jury not to take the allegations as true. *Pennell v. Meyer*, 2 M. & Rob. 98. See *Proof of Chancery proceedings*, *post*, pp. 106, *et seq.* The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts. *Smith v. Blandy*, Ry. & M. 257. But a party cannot examine a witness, who is called to prove the conversation against him, as to unconnected statements made by him (the party) on the same

Object of Evidence. In other words, ~~cases~~ containing distinct assertions of his own rights. The whole of a conversation are limits to the general proposition that the whole of a conversation is evidence, where part is admissible. *Semb. Prince v. Samo, 7 Ad. & El., cited under Re-examination of witnesses, post.*

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OBJECT OF EVIDENCE

The object of evidence is to prove the point in issue between the parties; and in doing this, there are three general rules to be kept in view:

1. That the evidence be confined to the issue;
2. That the substance of the evidence be proved;
3. That the burden of proof lies on the party who has the affirmative fact, if it be unsupported by any presumption.

THE ISSUE.

where a negative purpose, any into THE ISSUE.

As the object of pleading is to reduce the parties to distinct and simple issues, that no proof, oral or documentary, is admissible to those issues, and that the issues, if not stated, are excluded. Thus, the parties are to be reduced to distinct and simple issues, and the parties are to be reduced to distinct and simple issues, and the parties are to be reduced to distinct and simple issues.

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2 H. & C. 175; 32 I.
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32, C. A. See also
Gt. E. Ry. Co., 11
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L. J., C. P. 241. For s
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Thus, where the inquiry is, whether A. made a qualified
in disproof of goods to B.; and A. denies the qualification, it
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though merely to test his veracity of memory
B. N. S. 338; 27 L. J., C. P. 241. For s
Hyde v. Palmer, 3 B. & S. 657; 32 I.
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Facts of which the court will take judicial notice.] There are many unadvised by implica-
which the courts will notice judicially, and of which it is therefore unnecessary to give any evidence. The following are examples:—They will, it had been proved
King, 1 Wms. Saund. 131 b; course of proceedings in Parliament, note originated in a
Commons, *Stockdale v. Hansard*, 9 Ad. & E. 1; the existence of a war with
foreign state, *R. v. De Berenger*, 3 M. & S. 67; the existence of the House of
state recognised by the British Government; *Lane's case*, 2 Rep. 17 b. The court took
Barclay, 2 Simons, 213; *Berne, City of, v. Bank of England*, 9 Ves. 347; How
several seals of the Queen; as the great seal, *Ld. Melville's case*, 29 How
leases of land in its management; and seal of the Exchequer attached
Tr. 707; privy seal, privy signet, and seal of the Admiralty courts, prove themselves
judicial notice of the seal of the City of London; *Doed v. Westminster*. See *Kemp*
1 Esp. 63; so of a seal of the City of London; *Doed v. Westminster*. See *Kemp*
ales, and of the Ecclesiastical and Admiralty courts, prove themselves
t the cases usually cited to show this are not satisfactory. See *Kemp*
Raym. 893 (Admiralty Court); *Olive v. Guin*, 2 Sid. 145; *Green v. Wall*
Ross, Cas. temp. Hardw. 108 (Ecclesiastical Courts); *Com. Dig. Testm. (A. 1)*, (A. 2)
Great Sessions of Wales), *Com. Dig. Testm. (A. 1)*, (A. 2)
that the seal of those courts authenticates the

not that it proves itself; nor does it follow, that where a statute authorises the use of a seal, the court is to take notice of the seal without proof of it.

The following seals are required by statute to be judicially noticed: The Chancery Common Law Seal, 12 & 13 Vict. c. 109, s. 11; the Seal of the Enrolment Office in Chancery, 12 & 13 Vict. c. 109, s. 17; of the Probate Court, 20 & 21 Vict. c. 77, s. 22; of the Divorce Court, 20 & 21 Vict. c. 85, s. 13; of the Admiralty Court, 24 & 25 Vict. c. 10, s. 14; of the Bankruptcy Court, 46 & 47 Vict. c. 52, s. 137 (formerly 32 & 33 Vict. c. 71, s. 109); the wafer great seal, and wafer privy seal; 40 & 41 Vict. c. 41, ss. 4, 5 (3a); the Patent Office seal, 46 & 47 Vict. c. 57, s. 84.

By Rules, 1883, O. lxi., r. 7, "all copies, certificates, and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document."

By the J. Act, 1873, s. 61, writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of a district registry of the High Court of Justice, shall be received in evidence without further proof.

The seal of a notary public has been judicially noticed; Bayley on Bills, 490; *Anon.*, 12 Mod. 345; *Cole v. Sherard*, 11 Exch. 482; and see Rules, 1883, O. xxxviii., r. 6, *infra*, and 15 & 16 Vict. c. 86, s. 22, *post*, p. 78: see, further, *Effect of Notarial and Consular Certificates, post*.

By the 14 & 15 Vict. c. 99, s. 10, "every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law, or by consent of parties, authority to hear, receive and examine evidence, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

By the 18 & 19 Vict. c. 42, s. 3, "any document purporting to have affixed, impressed, or subscribed thereon, or thereto, the seal and signature of any British ambassador, envoy, minister, *chargé-d'affaires*, secretary of embassy or of legation, consul-general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act, having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person."

By Rules, 1883, O. xxxviii., r. 6, "all examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed at the Central Office, may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or

before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document." This rule is almost identical with stat. 15 & 16 Vict. c. 86, s. 22: see thereon *Brooke v. Brooke*, 17 Ch. D. 833. See also *De Leon v. Hubbard*, W. N. 1883, p. 197, Field, J.

There are numerous provisions which make copies of documents, authenticated by the seal of a court or public body, good evidence without further proof. See *post*, pp. 93, *et seq.*

By the 8 & 9 Vict. c. 113, s. 2, "all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at *Westminster*, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document." This section applies when the signature is affixed by a stamp in the usual manner; see *Blades v. Lawrence*, L. R., 9 Q. B. 374.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 137, judicial notice shall in all legal proceedings be taken of the seal and of the signature of the judge or registrar of any court having jurisdiction in bankruptcy. By sect. 127, general rules and orders made under the Act are to be judicially noticed. See also sect. 140, as to orders and certificates issued by the Board of Trade. See further *post*, Part III., *Actions by and against trustees of bankrupts*.

By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 30, documents signed by the commissioners appointed under that Act, or any one of them, are to be received in evidence without proof of the signature.

By the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 111, rules made thereunder are to be judicially noticed.

By the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 96, certain certificates purporting to be under the hand of the comptroller of patents are *prima facie* evidence.

There is no doubt that the existence of all the superior courts will be judicially noticed; *Tregany v. Fletcher*, 1 Ld. Raym. 154: and so of course will that of all courts established by Act of Parliament. In *Dobson v. Bell*, 2 Lev. 176, and *Pugh v. Robinson*, 1 T. R. 118, it was stated generally, that the practice of the superior courts would be judicially noticed; but in *Caldwell v. Hunter*, 10 Q. B. 86, Ex. Ch., Maule, J., seemed inclined to doubt whether, the jury having found the practice to be one way, the Court could hold it to be another, when the practice was not prescribed by statute, or by the common law, by which latter expression he seems to mean immemorial usage, as distinguished from modern usage. The doubt is altogether not very clearly expressed, and Parke, B., appears not to have assented to it.

The courts formerly took notice of the law of England as administered in the Court of Chancery. *Sims v. Marryatt*, 17 Q. B. 281; 20 L. J., Q. 454. But the practice of that court was proved by oral evidence in *Dicas v. Brougham, Ltd.*, 1 M. & Rob. 309, where Ld. Eldon was witness to prove that practice, and in *Tucker v. Inman*, where equity counsel were called for a similar purpose. In Exch. 705; 22 L. J., Ex. 269, the court proceeded itself as to the jurisdiction of, and proceeded

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Kearney v. King, 2 B. & A. 303; *sed quære?* for this appears in several Acts of Parliament. Though the courts took judicial notice of the articles of war which were printed by the King's printer (*Bradley v. Arthur*, 4 B. & C. 304; *R. v. Withers*, cited 5 T. R. 446), and are now bound to do so by the Mutiny Act, yet the book called "Rules and Regulations for the Government of the Army" will not be noticed. *Bradley v. Arthur*, *supra*.

The courts would not formerly notice the seal or proceedings of a foreign court; *Henry v. Adey*, 3 East, 221; *Ganer v. Lanesborough, Lady*, Peake, 17; but this is altered by the 14 & 15 Vict. c. 99, s. 7, cited *post*, p. 95.

The courts are bound to take notice of the law and privilege of the Stannaries; Co. Litt. 11 b; *Gaved v. Martyn*, 19 C. B., N. S. 732, 757; 34 L. J., C. P. 353, 362, *per* Erle, C. J.

As to how far judicial notice will be taken of the custom of gavelkind and borough English, see Co. Litt. 175 b, (4); Robinson on Gavelkind, 41; *Rider v. Wood*, 1 Kay & J. 644; 24 L. J., Ch. 737; 1 Taylor, Evid. § 5. There are perhaps some other customs of which judicial notice would be taken, especially some of those in use amongst persons engaged in commerce. See *Lethulier's case*, 2 Salk. 443. In *Brandão v. Barnett*, 3 C. B. 519, the court took judicial notice of the lien of bankers on the securities of customers in their custody. Probably also judicial notice would, in some cases, be taken of the practice of solicitors. *Shoreditch Vestry v. Hughes*, 17 C. B., N. S. 137; 33 L. J., C. P. 349. In the case of *In re Bodmin United Mines*, 23 Beav. 370; 26 L. J., Ch. 570, Romilly, M. R., refused to take judicial notice of the nature of an association on the cost-book principle; but the constitution of these associations has since been recognised by the legislature in the Stannaries Act, 1869 (32 & 33 Vict. c. 19). A custom of which judicial notice is taken ought to be considered, not as a fact, but as part of the general law of the land; *vide ante*, pp. 23, 24.

The courts of the City of London will take judicial notice of the city customs; Com. Dig. London (N. 1), (N. 7); 1 Doug. 380, n.; and the Court of Quarter Sessions, of petty sessional divisions of a county. *R. v. Whittles*, 13 Q. B. 248.

Evidence of collateral facts.] In general, evidence of collateral facts, not pertinent to the issue, is not admissible. Thus, where the question was whether beer supplied by plaintiff to the defendant was good, the plaintiff was not allowed to give evidence of the quality of beer supplied by him to other persons. *Holcombe v. Hewson*, 2 Camp. 391. In an action by indorsee against the acceptor of a bill who defends on the ground of forgery, evidence that the drawer suspected of the forgery has forged the defendant's name in other instances, is inadmissible. *Balcetti v. Serani*, Peake, 142; *Griffiths v. Payne*, 11 Ad. & E. 131. See also *Hollingham v. Head*, 4 C. B., N. S. 338; 27 L. J., C. P. 241, *ante*, p. 76. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of such fact is admissible. Thus in an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the house or the real principal, evidence is admissible to show that other persons had received orders from the defendant to do work at the same houses without showing that the plaintiff knew of these orders at the time he did the work. *Woodward v. Buchanan*, L. R., 5 Q. B. 285. So in an action by a rector for tithes, where the question is whether a modus exists of a certain sum of money for a particular farm in a township within the parish, the plaintiff may inquire whether other farms in the same township are not subject to the same payment, for the purpose of showing that such payments cannot be a farm modus. *Blundell v. Howard*,

1 M. & S. 292. So proof of the local usage of trade, &c., may be material to explain a contract, or to disprove an alleged breach of it. *Noble v. Kennoway*, 2 Doug. 510. But the usage at Lloyd's is not evidence, unless the contract be made with reference to that usage. *Gabay v. Lloyd*, 3 B. & C. 793. In a case of libel, where the meaning is ambiguous, other similar libels on the plaintiff by the same defendant may be shown against him; see *post*, *Action for defamation*. Upon a question of skill and judgment, evidence may be given of facts, which, although in other respects collateral, are by means of the skill and judgment of the witness connected with, and tend to elucidate, the issue. *Folkes v. Chadd*, 3 Doug. 157. See *Opinion of Witness, when admissible, post*, p. 165. Where the object of the evidence is to show the *knowledge* of the party with regard to the nature of a particular transaction, evidence of his having been engaged in other transactions of the same kind is admissible; thus, in cases of forgery and coining, proof that the prisoner has passed other forged notes, or other counterfeit coin, is constantly admitted. So also upon questions of *intent*, evidence of other transactions is admissible. In an action for bribery, evidence of other acts of bribery by the defendant at the same time and place is admissible to show the *animus*. *Webb v. Smith*, 4 N. C. 373. The seditious object of a meeting may be shown by the acts of similar meetings in other places convened by the same person. *Redford v. Birley*, 3 Stark. 93. In order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced that he had accepted other similar bills under circumstances that indicated such knowledge or authority. *Gibson v. Hunter*, 2 H. Bl. 288. Examples of the exclusion or admission of collateral facts might be multiplied to any extent; but it will be enough to add generally, that all proof of facts which merely tends to create an unjust prejudice, or unduly to influence the jury, or occupy the time of the court in irrelevant inquiries, is inadmissible; but if the proof be directly or inferentially pertinent to the issue, it will be admitted.

Evidence of rights in other manors and places.] As a general rule, proof of a customary right in a particular manor or parish is no evidence as to the customary right in an adjoining manor or parish. *Somerset, Dk. of, v. France*, 1 Stra. 661. But there are occasions on which such evidence is relevant. Thus, where there is proof that all the manors in a particular district are held under the same tenure, and a question arises in one of the manors as to an incident to the tenure, evidence may be given of the usage prevailing in the others. *Ibid.*; *Champion v. Atkinson*, 3 Keb. 90; *R. v. Ellis*, 1 M. & S. 662. So where in each of several detached manors called by the common name of "assessionable manors," and parcel of the possessions of an ancient earldom and duchy, it appeared that there was a peculiar class of tenants answering the same description, to whom tenements were granted by similar words, it was held that evidence of the mineral and other rights enjoyed by those tenants in one manor might be received to show what were their rights in another. *Rowe v. Brenton*, 8 B. & C. 758 (case of the duchy of Cornwall). But mere contiguity, or the identity of the leet or parish in which two manors are situate, or payment of a chief rent by one to the other, will not let in such evidence. *Anglesey, Ms. of, v. Hatherton, Ltd.*, 10 M. & W. 218. Where the question was, whether a slip of land between some old inclosures and the highway was vested in the lord of the manor or the owner of the adjoining freehold, it was held that evidence could not be received of acts of ownership by the lord of the manor on *similar, but distinct*, slips of land within the manor.

Aliter, if the strips, though detached, could be regarded as part of a continuous tract of waste adjoining the same highway. *Doe d. Barrett v. Kemp*, 2 N. C. 102, Ex. Ch. And, even if the continuity be broken, it is a question for the jury whether such strips alongside the same road be not waste. *Dendy v. Simpson*, 18 C. B. 331. Where the question was as to the right to certain trees growing in a woody belt held entire and undivided under one title, evidence was admitted of acts of ownership in different parts of the belt. *Stanley v. White*, 14 East, 332. So acts of ownership in part of a wood, though unenclosed, or in part of a continuous fence, are evidence as to the whole. *Jones v. Williams*, 2 M. & W. 331. So where the plaintiff claims the whole bed of a river between his land and the defendant's, acts of ownership over the river just below the defendant's land are admissible; and the evidence need not be confined to the precise spot of the trespass. *Id.* 336; *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P. This principle applies also to the foreshore of a navigable tidal river. *Ld. Advocate v. Ld. Blantyre*, 4 Ap. Ca. 770, 791, D. P. So in the case of an inland non-tidal lake. *Bristow v. Cormican*, 3 Ap. Ca. 641, 670, *per* Ld. Blackburn. But in trespass by the proprietors of a canal, it was doubted whether evidence of acts of ownership by the proprietors on other parts of the banks than those in question was admissible to prove property without showing that they had belonged to one person; for the proprietors may have bought the freehold in one place and not in another; and, being unnecessary, there was no ground for presuming such a purchase in any place. *Hollis v. Goldfinch*, 1 B. & C. 205; *Tyrrhitt v. Wynne*, 2 B. & A. 554. In proof of the boundary between the manors A. and B., evidence is admissible of the boundary between A. and C., C. being a manor abutting on B., and separated from A. by a natural boundary (namely, a mountain ridge), which continued between A. and B. *Brisco v. Lomax*, 8 Ad. & E. 198. Under a lease of all minerals under a tract of waste land called M. mountain, working a mine under one part of it is evidence of possession of the whole subject of demise, so as to entitle the lessee to sue in trover for ore taken by a wrongdoer from any part of it. *Taylor v. Parry*, 1 M. & Gr. 604; *Wild v. Holt*, 9 M. & W. 672. Where the question was, whether a township, A., was liable to repair an ancient highway, the conviction of an adjoining township, B., for non-repair of the part situate in the latter, is evidence against A. that the highway situate in A. is also ancient. *R. v. Brightside Bierlow*, 13 Q. B. 933. Where the construction of the charters of the Duchy of Lancaster was in question, proof that under them coroners were always appointed in some parts of the Duchy was admitted to prove the like right of appointment in any part. *Jewison v. Dyson*, 9 M. & W. 540.

Evidence of damage.] By Rules, 1883, O. xxi., r. 4, *ante*, p. 73, damages unless expressly admitted are deemed to be put in issue. Evidence tending to increase or diminish the damage is, of course, admissible, though not expressly involved in the issue. Thus, in an action for breach of promise of marriage, plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; *James v. Biddington*, 6 C. & P. 589; nor for seduction; *Hodsoll v. Taylor*, L. R., 9 Q. B. 79; nor for malicious prosecution: for it is nothing to the purpose "that damages are taken from a deep pocket." *Short v. Stoy*, Winton Sum. As. 1836, *per* Alderson, B.

But *special* damage cannot be shown unless alleged in the statement of claim; and it must be alleged with certainty on the sufficiency of which the judge is to decide, who will require that the averment shall be so made as to enable the defendant to meet it by counter-evidence, if untrue. Thus, where, in an action for an irregular distress, it was averred that the plaintiff,

in consequence of the injury, had lost *divers* lodgers, without naming any, Lord Ellenborough rejected evidence of the damage. *Westwood v. Cowne*, 1 Stark. 172. See further, *Craft v. Boite*, 1 Wms. Saund. 243 d, (5); *Martin v. Henrickson*, 2 Ld. Raym. 1007; and see *post*, *Action for defamation*. And now, Rules, 1883, O. xix., r. 15, *ante*, p. 72, require the plaintiff to allege all such facts as he relies on, as if not so alleged would be likely to take the defendant by surprise. But evidence of the amount of damage which is the *necessary* and *obvious* result of the defendant's breach of contract or tort may, it would seem, still be proved, though only alleged generally in the statement of claim. Thus formerly in an action for not giving plaintiff possession of premises demised to him by the defendant, plaintiff was allowed to show his consequent loss of business, though only alleged generally, and though the plaintiff's business was not mentioned in the pleadings. *Ward v. Smith*, 11 Price, 19. See also *Rodgers v. Nowill*, 5 C. B. 109.

Evidence of Character.] In general, in actions unconnected with character evidence as to the character of either of the parties to a suit is inadmissible, being foreign to the point in issue and only calculated to create prejudice. For the same reason, where particular acts of misconduct are imputed to a party, evidence of general character is excluded; but it is otherwise where general character is put in issue; *Doe d. Farr v. Hicks*, *per* Buller, J., cited 4 Esp. 51; *Jones v. James*, *infra*; 1 Taylor, Evid. §§ 328, 329; for evidence of bad character is admitted in some actions with a view to the amount of damages. Thus, in actions of crim. con., the defendant could adduce evidence of the wife's bad character for chastity, and even of particular acts of adultery committed by her before her intercourse with him; for, by bringing the action, the husband put her general behaviour in issue. B. N. P. 27, 296. So, in seduction, the defendant may show the previous bad character of the person seduced. See *post*, *Action for seduction*. But even in such cases, it has been held that the plaintiff cannot give evidence of the *good* character of the wife or daughter, until evidence has been offered on the other side to impeach it; *Bamfield v. Massey*, 1 Camp. 460; and if such evidence be not general, but go only to a specific instance, it has been ruled that the plaintiff cannot, in reply, give evidence of general character, but must be restricted to disproof of the specific instance. *Ibid.*; *Dodd v. Norris*, 3 Camp. 519. So in an action for slander imputing dishonesty to the plaintiff, he cannot adduce evidence, in the first instance, of good character. *Stuart v. Lovell*, 2 Stark. 93; *Cornwall v. Richardson*, Ry. & M. 305. Where the cross-examination of the plaintiff's witness has been directed to impeach the character of the plaintiff, and the witnesses *deny the imputation* intended, proof of the plaintiff's good character is not admissible. *King v. Francis*, 3 Esp. 116.

The practice, as reported in some of the above cases, which excludes the proof of general good character, where it is obviously attacked at the trial, though unsuccessfully, has been generally condemned by later text writers; and there are some authorities at N. P. for the admissibility of such testimony. See *post*, *Actions for seduction and for defamation*; and 1 Taylor, Evid. § 335.

In an action for breach of promise of marriage, where the defendant by his plea sets up a *general* charge of immodesty, the plaintiff may, in the first instance, give general evidence of good character for modesty and propriety of demeanour; though this could not be done in the case of a specific charge of immoral acts. *Jones v. James*, 18 L. T., N. S. 243; E. T. 1868, Ex. Where general character is in issue, evidence of general reputation is admissible. *Foulkes v. Sellway*, 3 Esp. 236.

As to evidence of character, in reference to the veracity of a witness, *vide post*, p. 173.

Plaintiff confined to his particulars.] The delivery of particulars of claim or defence in ordinary actions is now regulated by Rules, 1883, O. xix., rr. 6, 7, and particulars are now usually given in the pleadings. It would seem that the particulars indorsed on a writ of summons under O. iii., r. 6, will in the absence of other particulars be considered as particulars of demand, though the rule contains no express provision to that effect similar to that contained in the C. L. P. Act, 1852, s. 25.

Where the plaintiff has delivered particulars of his demand, he will be precluded from giving any evidence of demand not contained in them. But the plaintiff may recover more than his particulars demand, where it appears to be due *on the defendant's own evidence*; as where the defendant gave in evidence an account from which it appeared that there was a sum of money due to the plaintiff beyond that claimed in his particulars. *Hurst v. Watkis*, 1 Camp. 68. *Accord. per Parke, B., in Fisher v. Wainwright*, 1 M. & W. 486. See also *Green v. Marsh*, 5 Dowl. 669. A mistake in the particulars, not tending to mislead, is immaterial. The materiality of the variance is a question for the judge, subject to the opinion of the court above.

The particulars may be amended, even after the discovery of their insufficiency on the trial: and where the mistake has been made inadvertently, and the defendant has not been prejudiced, they will be amended almost as a matter of course. If the amendment may prejudice the defendant the judge may sometimes think proper to adjourn the cause. See *Fromant v. Ashley*, 1 E. & B. 724. This power of amendment renders it useless to retain many cases formerly collected under this head. After delivery of particulars under a judge's order (or, *ut semb.*, under O. xix., r. 6), fresh or amended particulars cannot be delivered except by a judge's order or by consent, so as to supersede the first at the trial. *Brown v. Watts*, 1 Taunt. 353. It is, however, competent for the opposite party to waive the objection and accept the second particulars; and if the party served pleads over and goes to trial, he will be taken to have accepted them. *Fromant v. Ashley, supra*.

If the particulars are too general, or not sufficiently explicit, the remedy is to apply for a better; for it seems to be no ground of objection at the trial, except in the case of particulars of set-off, and in that case, where the terms of the order exclude the proof unless the particulars comply strictly with the terms of the order; if the particulars do not strictly comply with the order, the judge will reject the proof of it at the trial. *Ibbett v. Leaver*, 16 M. & W. 770; *Young v. Geiger*, 6 C. B. 552; and the plaintiff does not waive the objection by merely denying the set-off and going to trial. S. CC. Irregular particulars of set-off, may, however, be waived. Thus, where the order was to deliver it in a fortnight, and the plaintiff accepted it three weeks later, and the plaintiff afterwards amended his declaration by consent, Lord Tenterden, C. J., admitted proof of the set-off. *Wallis v. Anderson*, M. & M. 291; also *Lovelock v. Cheveley*, Holt, N. P. 552.

Effect of particulars as an admission.] The object of particulars is to control the generality of the claim, or set-off, in respect of which they are delivered. Their value as an admission depends upon the mode in which they are framed. When they merely limit the amount claimed in the pleadings, no admission can be implied; but where they, in addition, give credit to the opposing party for some particular specific item, they are

evidence in his favour as to the date, origin, and nature of that item. In *Rymer v. Cook*, M. & M. 86 n., where the defendant put in particulars of the plaintiff's demand, containing an admission that he was indebted to the defendant in a certain sum, it was held that that admission was evidence. In *Kenyon v. Wakes*, 2 M. & W. 764, where a payment on account to the amount of 70*l.* was admitted in the particulars, and the jury found that 70*l.* was all that was due, it was held that the particulars were properly received in evidence as an admission of the payment of that sum. See *Boulton v. Pritchard*, 4 D. & L. 117, *infra*, and *Rowland v. Blaksley*, 1 Q. B. 413. In *Buckmaster v. Meiklejohn*, 8 Exch. 634; 22 L. J., Ex. 242, particulars delivered with a plea of set-off, which had been withdrawn, were admitted in support of a replication of fraud to a plea *puis darrein continuance*. It would seem, however, that particulars can only be made use of as an admission in an issue upon the pleadings in respect of which they are delivered. Therefore, in *Miller v. Johnson*, 2 Esp. 602, where the notice of set-off contained an admission of a sale, this was not allowed to be taken as an admission of the sale upon the plea of never indebted. In *Harington v. Macmorris*, 5 Taunt. 229, an admission of the debt in the notice of set-off was not received in the issue raised upon *non-assumpsit*. And in *Burkitt v. Blanshard*, 3 Exch. 89, where a simple payment of 50*l.* was inserted in the particulars of set-off, Parke, B., expressed an opinion that the plaintiff could not have taken this as an admission of a part payment in order to prevent the operation of the Statute of Limitations.

Proof of particulars.] The particulars were formerly proved by the production and proof of the judge's order and the particulars themselves: and by proof of the signature of the party, his attorney, or agent. The R. G., H. T. 1853, r. 19, which directed that a copy of the particulars of demand and the defendant's set-off should be annexed by the plaintiff's attorney to the record at the time it is entered for trial, obviated the necessity of proving the delivery of them. *Macarthy v. Smith*, 8 Bing. 145. But the particulars were not thereby made part of the *Nisi Prius* record and incorporated with the pleading to which they were annexed. *Booth v. Howard*, 5 Dowl. 438; *Ferguson v. Mahon*, 9 Ad. & E. 245. The Rules, 1883, contain no provision similar to R. G., H. T. 1853, r. 19, *supra* (see O. xxxvi., r. 30), and it seems therefore that particulars, unless they are in the pleadings, or have been entered with them, must be proved in the same way as was done before 1853. If the defendant require to prove special indorsement under Rules, 1883, O. iii., r. 6, on the writ of summons, the copy writ, served on him, would, it seems, be primary evidence against the plaintiff; *vide ante*, p. 3, and *post*, p. 105.

If the particulars of demand refer to a fuller account already delivered (which it may do without restating it, *ut semb.* *Hatchet v. Marshall*, Peake, 172), the plaintiff ought either to enter the account also with the pleadings, or prove it at the trial. See 2 Chit. Prac., 12th ed. 1456. If the plaintiff delivers "further and better" particulars, in which he omits a specific credit given in his first, it seems that *both* should be annexed to the record; and if the second alone is annexed, the defendant may nevertheless prove the first in order to dispense with a plea of payment. *Boulton v. Pritchard*, 4 D. & L. 117. Where the particulars annexed differ from those delivered, the defendant may prove the latter, and confine the plaintiff to those. But if the defendant is not prepared to prove the real particulars, the plaintiff, if he obtains a verdict for any item *not* contained in them, is in peril of a new trial. *Morgan v. Harris*, 2 C. & J. 461. If none are annexed, the judge may order the plaintiff to annex them at *Nisi Prius*.

THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED.

It was always the common law rule that the *substance* of the issue joined between the parties need alone be proved, and numerous illustrations of this principle will be found under various titles in this work.

Variances requiring amendment.] It is a general rule that a party must recover *secundum allegata et probata*, and cannot succeed upon a proof that differs from his allegation; if his proof so differ it is called a variance. Now, however, by Rules, 1883, O. xxviii., r. 1, either party may at any time be allowed to amend their pleadings, "and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Since this rule parties must not go to trial on the mere hope that a variance will be fatal. They ought to anticipate that all amendments will be allowed which are necessary to determine the real question in controversy, which both parties must have had in contemplation when the suit commenced. Examples of amendments that have been allowed will be found *post*, *sub tit.* *Practices at Nisi Prius*,—*Amendment*.

The only cases of variance which it is necessary to consider are those relating to parties.

Variance in the parties.] The objection on the ground of variance in the parties is now abolished by Rules, 1883. By O. xvi., r. 1, "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment;" rule 3 provides that the improper or unnecessary joinder of a co-plaintiff shall not defeat a set-off or counter-claim if the defendant prove it as against the other plaintiffs; rule 4 contains similar provisions with respect to defendants; rule 5 provides that it shall not be necessary for every defendant to be interested as to all the relief prayed for or as to every cause of action included in the action; by rule 6, the plaintiff may join as parties "all or any of the persons severally or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes." By rule 2 provision is made for the substitution or addition of a plaintiff in the case of a *bond fide* mistake. By rule 11, "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent *in writing* thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter

mentioned, or in such manner as may be prescribed by any special order, and the proceedings, as against such party, shall be deemed to have begun only on the service of such writ or notice." Rule 12, "Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner." And by O. xxi., r. 20, "No plea or defence shall be pleaded in abatement." It seems that any objection as to parties which was formerly taken by plea in abatement, must now be taken by the application for an order under O. xvi., r. 11. *Kendall v. Hamilton*, 4 Ap. Ca. 504, 516, per Ld. Cairns, C.; before the trial; *Sheehan v. Gt. E. Ry. Co.*, 16 Ch. D. 59; the plaintiff now being able to join as a co-defendant any person to whose nonjoinder as a co-plaintiff exception is taken. *Id.* 63. See *Luke v. S. Kensington Hotel Co.*, 11 Ch. D. 121, C. A. Two or more persons may under O. xvi., r. 1, as co-plaintiffs, bring an action of libel, although they are not jointly interested. *Booth v. Briscoe*, 2 Q. B. D. 496, C. A.

A party can only be added under rule 2 where there has been a *bond fide* mistake; *Clowes v. Hilliard*, 4 Ch. D. 413; a mistake of law is sufficient. *Duckett v. Gover*, 6 Ch. D. 82.

A plaintiff will not be added unless either his written (see r. 11, *ante*, p. 86) consent has been obtained, or terms necessary for his indemnity have been offered to him. *Turquand v. Fearon*, 4 Q. B. D. 280. A defendant may be added under rule 4, although alternative relief is claimed against him which is inconsistent with that claimed against the other defendant. *Child v. Stenning*, 5 Ch. D. 695, C. A. As to amendment of misjoinder of husband, suing with his wife in respect of her separate estate, see *Roberts v. Evans*, 7 Ch. D. 380.

Although the misjoinder or nonjoinder of parties is no longer fatal to the action, it is still necessary to know whether the proper parties are before the court at the trial, as otherwise an amendment may be required under O. xvi., r. 11, *ante*, p. 86, which will sometimes involve the adjournment of the trial. The following cases relating to parties are therefore retained. Where three persons agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made the contract accordingly; it was held that all the three might sue for a breach of that contract; *Cothay v. Fennell*, 10 B. & C. 671; for the action may be maintained either in the name of the person who actually made the contract, or in the name of the parties really interested; *Skinner v. Stocks*, 4 B. & A. 437; *Clay v. Southern*, 7 Exch. 717; 21 L. J., Ex. 202. But, regularly, on a written contract by A. "on behalf of B," B. should be sued, and not A.; *Downman v. Williams*, 7 Q. B. 103, Ex. Ch.; *Lewis v. Nicholson*, *infra*; *Collen v. Wright*, 7 E. & B. 301; 26 L. J., Q. B. 147, Ex. Ch.; 8 E. & B. 647; 27 L. J., Q. B. 215; *Jenkins v. Hutchinson*, 13 Q. B. 744; unless A. be the real principal, and proof of this lies on the plaintiff. Thus, if A. falsely represents himself as agent of a person *not named*, being really himself the principal, he may then be sued as such. See *Carr v. Jackson*, 7 Exch. 382; 21 L. J., Ex. 137. So the real principal may sue on a contract in which he calls himself agent of a third person, unnamed. *Schmalz v. Avery*, 16 Q. B. 655; 20 L. J., Q. B. 228. But a party *contracting as agent* of B. cannot be sued personally as principal, if he be neither authorized by B., nor be himself the real principal; the only remedy against him will be for the false representation or breach of warranty of authority. *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311. Unless indeed B. has no existence, in which case the agent is personally liable. *Kelner v. Baxter*, L. R., 2 C. P. 174. A *del credere* agent selling for a disclosed principal cannot sue in his own name. *Bramble v. Spiller*, 21 L. T., N. S. 672, C. P.; nor can a

broker. *Fairlie v. Fenton*, L. R., 5 Ex. 169. The fact of the contracting party being called in the contract the agent of a named principal does not necessarily show that he ought not to be the party to a suit on the contract, although he be really such agent: it is a question of intention arising on the construction of the contract itself; "and it may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document, that he did not intend to bind himself as principal." 2 Smith's L. Cases, 8th ed. p. 400, notes to *Thomson v. Davenport*; *Dutton v. Marsh*, L. R., 6 Q. B. 361, 362; *Lennard v. Robinson*, 5 E. & B. 125; 24 L. J., Q. B. 275; *Gray v. Raper*, L. R., 1 C. P. 694; *Southwell v. Bowditch*, 1 C. P. D. 374, C. A.; *Gadd v. Houghton*, 1 Ex. D. 357, C. A. In these two last cases, though the agent signed without qualification, the contract showed that the intention was that he should not be bound personally, and in the latter case the decision in *Paice v. Walker*, L. R., 5 Ex. 173, was doubted. It has however since been followed in *Hough v. Manzanos*, 4 Ex. D. 104. See further *Wagstaff v. Anderson*, 5 C. P. D. 171, 175, C. A., *per* Bramwell, L. J. As to admissibility of evidence of custom to charge a broker personally, *vide ante*, p. 25.

Where an attorney carried on business under the firm of "A. and Son," the son not being in fact a partner, but only a clerk, it was held that A. might sue in his own name for the amount of a bill for business done. *Kell v. Nainby*, 10 B. & C. 20. An agent who purchases for an unnamed principal (the bought and sold notes being made out in the agent's name) may, on the renunciation of the contract by his principal, sue for the non-delivery of the goods in his own name. *Short v. Spackman*, 2 B. & Ad. 962. Provisional directors of a proposed company invited applications for shares to a committee of management appointed by and from themselves. The defendant applied for and received shares on the terms that he should pay a deposit, and got a form of receipt for the deposit on account of the "provisional committee." Held that the action to recover the deposit should be by the provisional committee of directors at large, and not by the committee of management. *Woolmer v. Toby*, 10 Q. B. 691.

Plaintiff may join, as co-defendant, a dormant partner not known to him at the time of the contract, even where there was a written agreement (not under seal) to which such partner was not party. *Drake v. Beckham*, 11 M. & W. 315, Ex. Ch. But this does not apply to the case of a bill of exchange or promissory note, see the Bills of Exchange Act, 1882, s. 23; and if the agreement was in terms with "A and B. and the survivor of them," it cannot be stated as one between A. and C. (the dormant partner) and the survivor of them. *Beckham v. Knight*, 1 M. & Gr. 738; *De Mautort v. Saunders*, 1 B. & Ad. 398.

Where a married woman deposited the moneys of her husband with a banker in the name of a child under age, it was held that the husband might sue the bankers for money had and received. *Calland v. Loyd*, 6 M. & W. 26.

By the Bankruptcy Act, 1883, s. 114, "Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract, without the joinder of the bankrupt."

Local venue.—By Rules, 1883, O. xxxvi., r. 1, "there shall be no local venue for the trial of any action except where otherwise provided by statute." Every action shall be tried in the county or place named on the statement of claim, or if there be none, by a notice in writing served on the defendant;

if no place is named, the trial is to be in Middlesex. In either case the court or a judge may order the trial to be elsewhere.

The words in italics are new, and thus local venue, which was entirely abolished by Rules, 1875, O. xxxvi., r. 1, is re-established in those cases in which the action is required by statute to be tried in a certain county. In such cases the objection that the venue is wrong must be raised by the defence, as it would be likely to take the plaintiff by surprise. Rules, 1883, O. xix., r. 15. The objection may, however, arise under the defence of not guilty by statute, *e.g.*, under stat. 11 & 12 Vict. c. 44, s. 10, for by O. xix., r. 12, that defence has the same effect as a plea of not guilty by statute had.

If in a local action the objection of wrong venue is properly taken, the defendant will be entitled to the verdict.

Where a county has for the purpose of the assizes been divided by Order in Council, under 3 & 4 Will. 4, c. 71, s. 3, each division is, for the purpose of venue, to be treated as a separate county. *Atkinson v. Hornby*, cited 9 Q. B. 978. Lancashire has, under that Act, been divided into three divisions, and Yorkshire into two.

ONUS PROBANDI.

Generally he who asserts a fact is bound to prove it, if there be no presumption in favour of it; and a negative need not ordinarily be proved. *Ross v. Hunter*, 4 T. R. 33; *Calder v. Rutherford*, 3 B. & B. 302. In an action against a solicitor for negligently letting judgment go by default, after the plaintiff has proved the default, it lies on the defendant to show good ground for it, and not on the plaintiff to show that there was a good defence. *Godefroy v. Jay*, 7 Bing. 413. See a fuller explanation of this rule in Best on Evid. §§ 269, *et seq.* As to presumptions, *vide ante*, pp. 32, *et seq.* It must, however, be borne in mind, that regard must be had to the effect and substance of the issue, and not to its grammatical form. *Seward v. Leggatt*, 7 C. & P. 613, *per* Ld. Abinger; *Doe d. Worcester School, &c. Trustees v. Rowlands*, 9 C. & P. 734, *per* Coleridge, J.; *Belcher v. McIntosh*, 8 C. & P. 720, *per* Alderson, B. And where the assertion of a negative is part of the plaintiff's case he must prove it, as the want of reasonable and probable cause in an action for malicious prosecution. *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, C. A.

Where the presumption is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it; for the other party shall be presumed innocent until proved to be guilty. As to the presumption of innocence, see Best on Evid. §§ 314, 346. Thus where, in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had *not* read the Thirty-nine Articles, it was held that the proof of the issue lay on the defendant. *Monke v. Butler*, 1 Roll. Rep. 83. See also *R. v. Hawkins*, 10 East, 211. So in an action by the owner of a ship for putting combustibles on board, "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice, as the omission to give such notice would have amounted to criminal negligence on the part of the defendant. *Williams v. E. India Co.*, 3 East, 193. See further *ante*, p. 41. In actions for negligence it lies on the plaintiff to prove it, and not on the defendant to show reasonable care. *Marsh v. Horne*, 5 B. & C. 327. See further, *post*, *Action for negligence*; *Evidence of negligence*. So, again, where the issue is as to the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting the illegitimacy to prove it; *Banbury Peerage*

Case, 1 Sim. & St. 153; and where the issue is on the life of a person who is proved to have been alive within seven years, the party asserting his death must prove it; see *Presumptive evidence*, ante, pp. 40, et seq.

It has been stated to be a rule that, where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate, but the general rule applies, viz., that he who asserts the affirmative is to prove it, and not he who avers the negative. 3 Russell on Crimes, 4th ed. 277. Thus it has been said that in an action of a covenant for not insuring premises against fire, it lies on the defendant to prove that he has insured. *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 576, per Littledale, J. Accord. *Toleman v. Portbury*, L. R., 5 Q. B. 294, per Willes, J. So in an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. *Spiers v. Parker*, 1 T. R. 145; *R. v. Turner*, 5 M. & S. 206. In an action against a person for practising as an apothecary without having obtained a certificate according to 55 Geo. 3, c. 194, the proof of certificate was held to lie upon the defendant. *Apothecaries' Co. v. Bentley*, Ry. & M. 159. It has, however, been observed, that the act itself seems to throw upon him such proof. *Elkin v. Janson*, 13 M. & W. 662, per Alderson, B. So where, on a conviction for selling ale without a licence, the only evidence given was that the party sold ale, and no proof was offered of his want of a licence; it was held, that the conviction was right; for that the informer was not bound to sustain in evidence the negative averment; and it was said by Abbott, C. J., that the party thus called on to answer sustains no inconvenience from the general rule, for he can immediately produce his licence; whereas, if the case is taken the other way, the informer would be put to considerable inconvenience. *R. v. Harrison*, Paley on Convictions, 2nd ed., 45, n. From the observations of the court in *Doe d. Bridger v. Whitehead*, *infra*, it would seem that the burden of proof in the instances above cited of convictions, &c., lies on the defendant, not because the matter is peculiarly within his knowledge, for that cannot vary the rule of the law, but because the legislature has in those cases, by a general prohibition, made the act of the defendant *prima facie* unlawful. See also *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, 457, per Bowen, L. J. And in actions for the recovery of possession of land, on the ground of forfeiture, it always rests on the lessor, the plaintiff, to show that the estate which he has granted has been forfeited by the tenant. *Toleman v. Portbury*, *infra*. Thus, where the action is brought on a breach of a condition to insure "in some office in or near London," it lies on the plaintiff to prove the omission. *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571; see also *Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329. So where A. was lessee of a dwelling-house under a condition not to permit a sale by auction on the premises without his lessor's consent in writing, and he sublet to the defendant with the lessor's consent, and subsequently assigned his goods on the premises to X., who there sold them by auction; it was held that, in the absence of evidence that the sale was by A.'s permission, there was no forfeiture, and further, that the onus was thrown on the lessor of showing the non-existence of a written consent to the sale. *Toleman v. Portbury*, L. R., 5 Q. B. 288, Ex. Ch.

Under the Rules, 1883, O. xxi., r. 4, ante, p. 73, the plaintiff must prove the damages he alleges he has sustained, unless the defendant expressly admit them. In an action on a common money bond, the plaintiff need not show that the bond is forfeited; it rests on the defendant to prove payment. *Penny v. Foy*, 8 B. & C. 11, 13.

The question of the *onus* of proof is one which may arise in any stage of a trial, and is therefore not necessarily connected with, nor in all cases deter-

mined by, the same considerations as the right to begin on trials at *Nisi Prius*; as to which see further *post*, *sub tit.* *Course of evidence and practice at Nisi Prius*; *Right to begin*.

In many cases there are statutable provisions regulating the burden of proof. See them collected in 1 Taylor Evid., § 345; but these chiefly relate to criminal proceedings.

PROOF OF DOCUMENTS.

Under the present head will be considered the mode in which various kinds of documents, usually adduced in evidence, must be proved.

As a general rule, before a document can be proved at a trial it must itself be produced in court, but there are certain documents of a public character which either at common law or by statute are provable by copies without production of the original in court.

Before enumerating the means of proving the several documents under their respective heads, it will be convenient to show here when and how this method of proof is admissible.

PROOF BY COPIES.

The various kinds of copies by which original documents may in general be proved, may be classed under four heads; viz: 1. Exemplifications; 2. Office copies; 3. Examined copies; and 4. Certified copies.

There are certain statutory provisions for proving particular documents; these will be found under the title of the documents to which they respectively apply.

Proof by Exemplification.

Exemplifications are of two kinds:—under the Great Seal, or under the seal of the court in which the record is preserved. An exemplification under the Great Seal may be obtained of any record of the Court of Chancery, or of any record which has been removed thither by *certiorari*; but private deeds, so exemplified, will not be admitted in evidence. B. N. P. 227. An exemplification produced from the proper custody, and purporting to exemplify a commission from the crown, is evidence, though the seal has been lost. *Beverley, Mayor of, v. Craven*, 2 M. & Rob. 140. An exemplification under the seal of the Exchequer is evidence of a commission out of that court and of the return thereto, in respect of crown lands. *Tooker v. Beaufort, Dk. of, Sayer*, 297. So an exemplification of a recovery under the seal of the Great Sessions of Wales. *Olive v. Guin*, 2 Sid. 145. So of Chester, S. C. *Id.* And the seals of those courts (it is said) prove themselves. Com. Dig. Testm. (A. 2), *ante*, p. 76. Exemplification may be given of a lost probate. *Shepherd v. Shorthose*, 1 Stra. 412.

Proof by Office Copy.

An office copy, that is, a copy made by the officer having custody of the document, always was, in the same court and in the same cause, equivalent to the document of which it was a copy. *Per* Lord Mansfield, in *Denn d. Lucas v. Fulford*, 2 Burr. 1179; B. N. P. 229. And for this purpose, the judge who tried the issue at *Nisi Prius* was considered as acting under the

authority of the court in which the action is pending, and as an emanation of that court. *R. v. Joliffe*, 4 T. R. 285, 292. And now by the J. Act. 1873, ss. 29, 30, a judge or commissioner trying causes shall be deemed to constitute a court of the High Court of Justice. An office copy of depositions in Chancery was evidence in that court but would not be admitted in a court of common law without examination with the original; B. N. P. 229; unless, perhaps, in the case of the trial of an issue out of Chancery. See *Highfield v. Peake*, M. & M. 109, *per* Littledale, J. See, however, *Burnand v. Nerot*, 1 C. & P. 578, *cor.* Best, C. J., *contra*. See, further, as to proof of depositions, affidavits, &c., by office copies, *post*, pp. 108, 109. In an action against the sheriff for a false return, the plaintiff could not use office copies of the writ and return, though the original cause was in the same court, for the cause is a different one. *Pitcher v. King*, 1 Car. & K. 655.

By Rules 1883, O. xxxvii., r. 4, "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties to the same extent as the original would be admissible." The rule however, in so far as it alters the rule of evidence above stated, seems to be *ultra vires*; see J. Act, 1875, s. 20, *post*, p. 143. By O. lxi., r. 7, *ante*, p. 77, office copies are sufficiently authenticated if they appear to be stamped with a seal of the central office (constituted by stat. 42 & 43 Vict. c. 78, ss. 4, *et seq.*).

Office copies of documents registered or deposited in the central office, *e.g.* bills of sale, under 41 & 42 Vict. c. 31, s. 16; powers of attorney, under 44 & 45 Vict. c. 41, s. 48, are made evidence in some cases by statute.

Where a copy is made by a public officer specially intrusted to make copies and to deliver them to the parties as part of their title, they are admissible in evidence without proof of having been actually examined. B. N. P. 229; *Appleton v. Braybrook, Ltd.*, 6 M. & S. 34, 38. But a copy of a judgment, purporting to have been examined by the clerk of the Treasury (who is not intrusted to make copies), is not admissible without proof of its accuracy. B. N. P. 229. See further, *Proof by certified copy*, *post*, p. 93, and *Effect of public books and documents*, *post*, p. 199, *et seq.*

Proof by Examined Copy.

The contents of a document of a public nature required by law to be kept, may be proved by producing a copy verified by the oath of a witness who has compared it with the original, and will swear that it is complete and correct. What are public documents, in this sense, has never been very accurately defined; but the term seems to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit. *Lynch v. Clerke*, 3 Salk. 154. The term would clearly include all records of any court whatsoever, and all registers of births, deaths, and marriages; registers having reference to shipping and navigation, to trade, and to the public health; *vide post*, p. 117, *et seq.* The rule applies equally to such public registers kept abroad, as there is a presumption that the foreign authority in whose custody they are, would not allow their removal to this country. *R. v. Castro*, Q. B., trial at bar, 28th Nov., 1873, *ex rel. editoris* (*post*, p. 123), following *Lanesborough's (El. of) Claim*, 1 H. L. C. 510, n., and *Abbott v. Abbott*, 29 L. J., P. M. & A. 57, cited *post*, p. 121.

As to proof of depositions and affidavits filed in court, see *Proof of depositions and affidavits*, *post*, pp. 108, *et seq.*

An examined copy of a record or other document must be proved by a witness who has examined it line for line with the original, or who has

examined the copy while another person read the original. *Reid v. Margison*, 1 Camp. 469. And it is not necessary (though in peerage cases a more rigorous rule prevails (*Slane Peerage*, 5 Cl. & Fin. 42) for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill*, 1 Camp. 471, n.; *Rolf v. Dart*, 2 Taunt. 52. The copy must not contain abbreviations which do not occur in the original. *R. v. Christian*, Car. & M. 388. Where an examined copy is put in evidence, some account should be given of the original record; thus, it ought to be shown that the record, from which the copy was taken, was seen in the hands of the proper officer, or was in the proper place for the custody of such records. *Adamthwaite v. Synge*, 1 Stark. 183; S. C. 4 Camp. 372.

The 14 & 15 Vict. c. 99, s. 14 (*post*, p. 96), contains provisions for the admissibility of examined copies of public books and documents, and puts examined copies and copies certified under that act on the same footing. See cases decided thereon; *post*, p. 96.

Examined copies of bankers' books may be given in evidence, and may be verified by affidavit. Bankers' Books Evidence Act, 1879; 39 & 40 Vict. c. 11, ss. 3-5, *vide post*, p. 116.

Proof by Certified Copy.

By the 1 & 2 Vict. c. 94, s. 12, it is provided "that the Master of the Rolls, or deputy keeper of the records, may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers," appointed under the act, "and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." By sect. 13, "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either house, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

The records of all the superior courts, and some public records not of a judicial character, are after the lapse of a certain time deposited in the Record Office, in the custody of the Master of the Rolls.

There are some cases in which copies certified by persons not attached to any court, but holding a public position, are made evidence. The following are amongst the statutes containing such provisions:—The 41 Geo. 3, c. 109, s. 35, 3 & 4 Will. 4, c. 87, ss. 2 and 4, 8 & 9 Vict. c. 118, s. 146, awards and orders of Inclosure Commissioners; 7 Geo. 4, c. 46, ss. 4 and 6, returns made by bankers of the members, &c., of their firms; 3 & 4 Will. 4, c. 74, s. 88, acknowledgments of deeds by married women; 4 & 5 Will. 4, c. 30, ss. 10 and 11, 5 & 6 Vict. c. 27, s. 14, leases and exchanges, by ecclesiastical corporations; 6 & 7 Will. 4, c. 71, s. 2, agreements and awards confirmed by the Tithe Commissioners; Id. c. 86, s. 38, 25 & 26 Vict. c. 53, s. 123, documents from the General and Land Register Office; 5 & 6 Vict. c. 43, s. 11, 7 & 8 Vict. c. 12, s. 8, 25 & 26 Vict. c. 68, ss. 4 and 5, entries at Stationers' Hall relating to copyright; 6 & 7 Vict. c. 18, s. 68, decisions of the Common Pleas in appeals from revising barristers; 5 & 6 Vict. c. 108, s. 29

leases and instruments deposited with the Ecclesiastical Commissioners; 6 & 7 Vict. c. 86, s. 16, cab licences; 32 & 33 Vict. c. 71, s. 109, 46 & 47 Vict. c. 52, s. 134, proceedings of the Court of Bankruptcy; 7 & 8 Vict. c. 101, s. 69, proceedings of boards of guardians; 8 & 9 Vict. c. 18, s. 50, proceedings of the sheriff's court under the Lands Clauses Consolidation Act, 1845; Id. c. 20, s. 10, plans and books deposited with clerks of the peace by railway companies, with whose acts the Railways Clauses Consolidation Act, 1845, is incorporated; Id. c. 100, s. 7, orders and proceedings of the Lunacy Commissioners; 12 & 13 Vict. c. 109, ss. 11 and 17, documents issuing from Chancery and the Enrolment Office; 16 & 17 Vict. c. 70, s. 100, orders of the Lord Chancellor in Lunacy; 9 & 10 Vict. c. 95, s. 111, proceedings in the County Courts; 38 & 39 Vict. c. 87, ss. 80, 107, 120, certificates and instruments from the office of land registry; 21 & 22 Vict. c. 97, s. 7, orders of the Privy Council under the Public Health Act, 1858; 18 & 19 Vict. c. 121, s. 32, orders and resolutions of metropolitan local authority for removal of nuisances; 38 & 39 Vict. c. 55, s. 186, bye-laws made by local authority under that Act (the Public Health Act, 1875), and sect. 326, bye-laws not inconsistent with that Act, and made under Public Health Acts thereby repealed; 32 & 33 Vict. c. 70, s. 84, orders under the Contagious Diseases (Animals) Act; 14 & 15 Vict. c. 99, ss. 7, 8, 13 (*post*, pp. 95, 96), proclamations, treaties, and other acts of state, and judgments, decrees, orders, and other judicial proceedings of any foreign state, or in any British colony, and qualifications of apothecaries; 16 & 17 Vict. c. 137, s. 8, 18 & 19 Vict. c. 124, s. 5, orders and proceedings of the Board of Charity Commissioners; 33 & 34 Vict. c. 75, s. 83, orders, &c., of Committee of Privy Council on Education; 16 & 17 Vict. c. 41, s. 5, entries in registers kept under the Common Lodging House Acts of 1851 and 1853; 17 & 18 Vict. c. 104, ss. 107, 277, 25 & 26 Vict. c. 63, s. 26, shipping documents; 37 & 38 Vict. c. 42, s. 20, certificate of incorporation, &c., and rules of building societies; 38 & 39 Vict. c. 60, s. 39, 39 & 40 Vict. c. 45, s. 24, documents relating to friendly and industrial and provident societies; 25 & 26 Vict. c. 89, ss. 61 and 174, 40 & 41 Vict. c. 26, s. 6, proceedings of joint stock companies; 26 & 27 Vict. c. 65, s. 24, rules of volunteer corps; 27 & 28 Vict. c. 113, s. 33, bye-laws of Thames Conservancy; certificates under Id. c. 120, s. 18, and c. 121, s. 20, relating to railways; 29 & 30 Vict. c. 117, s. 33, and c. 118, s. 29, rules of reformatory and industrial schools; 31 & 32 Vict. c. 37 (extended by several subsequent acts, *vide post*, pp. 100, 101), proclamations and orders; 32 & 33 Vict. c. 67, s. 64, valuation of property in the metropolis; 33 & 34 Vict. c. 14, s. 12, declarations and certificates under Naturalization Act, 1870; 37 & 38 Vict. c. 67, s. 8, bye-laws relating to metropolitan slaughter-houses; 42 & 43 Vict. c. 33, s. 158, proceedings of court martial; 44 & 45 Vict. c. 60, s. 15, register of newspaper proprietors; 45 & 46 Vict. c. 50, s. 24, bye-laws and proceedings of municipal corporations; 46 & 47 Vict. c. 57, ss. 89, 96, patents and documents and registers in the Patent Office. There are also provisions which authenticate registers of births, baptisms, marriages, deaths, and burials, which are noticed at length; *post*, p. 118, *et seq.* By the Crown Lands Act, 1873 (36 & 37 Vict. c. 36), s. 6, a print, purporting to have been made by the order of either House of Parliament, of a report made by the Commissioners of Woods and Forests to her Majesty or Parliament, is as good evidence as the original.

By the Documentary Evidence Act (8 & 9 Vict. c. 113), s. 1, "whenever by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be

receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp, and signed as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

The meaning of the last paragraph in this section is by no means clear. In many cases there is no original record. The object of the statute seems to have been to dispense with proof of the genuineness of a document in all cases where it is by statute made evidence of the facts to which it relates. The signature of a *de facto* officer, who by virtue of that office has the custody of the records, is sufficient under this section, even though he be not the officer *de jure*. *R. v. Parsons*, L. R., 1 C. C. 24.

By Lord Brougham's Evidence Act (14 & 15 Vict. c. 99), s. 7, "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

A foreign patent is an "act of state" within the meaning of this section. *In re Bell's Patent*, 1 Moo. P. C., N. S. 49. And an order of a foreign court made *ex parte* on a shareholder is a judicial proceeding within the same section. *Leishman v. Cochrane*, *Id.* 315. Where the seal of the foreign court is affixed to a copy of the proceedings, for the double purpose of authenticating the proceedings and cancelling a stamp affixed thereon, that is sufficient. *Loibl v. Strampfer*, 16 L. T., N. S. 720, *cor.* Lush, J. It seems that the seal should be used, though so much worn as no longer to make any impression. *Cavan v. Stewart*, 1 Stark. 525.

By sect. 8, a certificate of the qualification of an apothecary, purporting

to be under the common seal of the society of apothecaries of the city of London, shall be received in evidence, without proof of the seal or of the authenticity of the certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the certificate duly qualified to practise as an apothecary in any part of England or Wales.

Sect. 12, which provided for the proof of documents required by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), was in terms almost identical with sect. 107 of that Act, cited *post*, p. 122, and was repealed by the Statute Law Revision Act, 1875.

By sect. 13, "whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

See *R. v. Parsons*, L. R., 1 C. C. 24, cited *ante*, p. 95. This section applies to proof in civil proceedings, even on the issue of *nul tiel record*. *Richardson v. Willis*, L. R., 8 Ex. 69. As to proof, under the C. L. P. Act, 1854, s. 25, of a conviction, in order to discredit a witness, see *post*, p. 173.

By sect. 14, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted;" and the officer is required to furnish such certified copy or extract on application at a reasonable time and payment of a reasonable sum not exceeding 4d. per folio of 90 words.

The first part of this last section down to the word "or" seems merely to declare the common law rule; *vide Proof by examined copy, ante*, p. 92. Where the copy is signed and certified as the section provides, it is admissible on its mere production in court. *R. v. Weaver*, L. R., 2 C. C. 85. Where a copy is informally certified, and therefore inadmissible, under this section, it may yet be proved to be an examined copy by *vivâ voce* evidence, for the provisions of the section are cumulative. *R. v. Mantering*, 1 Dears. & B. 132, 141; 26 L. J., M. C. 10, 14.

The register of parliamentary voters of a borough and the poll books were provable under this section by copies; *Reed v. Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; so are registers of births, marriages, &c.; *vide post*, p. 118, *et seq.*; and the bye-laws of a railway company duly made and allowed under 8 & 9 Vict. c. 20, ss. 108-111, may be proved by a certified copy under the hand of the secretary of the company in whose custody they are. *Mottram v. E. Counties Ry. Co.*, 7 C. B., N. S. 58; 29 L. J., M. C. 57.

It should be observed that copies or extracts, attested or in any manner authenticated, are in many cases liable to stamp duty. *Vide post, Stamps—Copy.*

CUSTODY OF ANCIENT WRITINGS.

In general the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and from which their genuineness may be inferred; before therefore proceeding to consider the proof of particular documents, a few observations of a general character will be made on this subject.

Ancient ecclesiastical terriers are not admissible unless found in a proper repository, viz. the registry of the bishop, or of the archdeacon of the diocese; *Atkins v. Hatton*, 2 Anstr. 386; *Potts v. Durant*, 3 Anstr. 795; or, as it seems, the church chest; *Armstrong v. Hewitt*, 4 Price, 216; which are also the proper repositories for the vicar's books; S. C. A terrier found in the registry of the dean and chapter of Lichfield has been admitted as against a prebendary of Lichfield. *Miller v. Foster*, 2 Anstr. 387 n. But mere private custody is not sufficient. *Potts v. Durant*, 3 Anstr. 789; *Atkins v. Drake*, M'C. & Y. 213. See also, as to terriers, *R. v. Hall*, L. R., 1 Q. B. 632. On an issue respecting the boundaries of two parishes, certain old papers were produced by the plaintiff (the rector of one of the parishes), which had come into the possession of the son of a former rector on his father's death, and which had been delivered by him, as papers belonging to the parish, to the witness (an attorney); it was held that the papers were sufficiently authenticated without calling the son of the former rector. *Earl v. Lewis*, 4 Esp. 1. Where a book, purporting to be the book of a former rector, came out of the custody of the defendant, his grandson, the proof was held insufficient; it not appearing how it came into the defendant's possession. *Randolph v. Gordon*, 5 Price, 312. In a suit for tithes, a receipt purporting to be a receipt given by a former rector forty-five years ago to a person of the same name as the defendant, and produced from the custody of the defendant, has been held admissible. *Bertie v. Beaumont*, 2 Price, 303. Where A., the defendant in a tithe suit, offered in evidence a receipt purporting to be a receipt from one B. to one A. 50 years before, without showing who B. was, or where the paper had been kept, it was rejected. *Mamby v. Curtis*, 1 Price, 225, Wood, B., *dissentiente*.

An ancient document relating to the interest of all the estates in the parish, would reasonably be expected to be found among the title deeds of a large estate in the parish. *R. v. Mytton*, 2 E. & E. 557; S. C., *sub. nom.* *Mytton v. Thornbury*, 29 L. J., M. C. 109.

An ancient writing enumerating the possessions of a monastery, produced from the Herald's Office, is inadmissible. *Lygon v. Strutt*, 2 Anstr. 601. So an old grant to an abbey, contained in a manuscript register entitled "Secretum Abbatis" in the Bodleian library, was rejected, as not coming from the proper repository. *Michell v. Rabbetts*, cited 3 Taunt. 91: *Bank of England v. Anderson*, 4 Scott, 83. So an ancient grant to a priory among the Cottonian manuscripts in the British Museum was rejected; it not appearing that the possession of the grant was connected with any person having an interest in the estate. *Swinerton v. Stafford*, Ms. of, 3 Taunt. 91.

In order to make an old document, as a manor book, &c., evidence, it was held not enough to produce it in court by the counsel of the party to whose custody it belongs, or by his steward, or even by the party himself; some witness who can speak as to the custody of it, should be sworn in court. *Evans v. Rees*, 10 Ad. & E. 151. And if any suspicion arises as to the genuineness of it, the judge, before he admits it in evidence, will require

information where it has been kept for some years back; when it was first seen, &c. *R. v. Mothersell*, 1 Stra. 93. But however reasonable this security against fraud may be in some cases, it has been held enough if it be shown that such an instrument as an expired lease comes from the possession of the land agent of the lessor, though he may not be in court to produce it; *Doe d. Earl of Shrewsbury v. Keeling*, 11 Q. B. 884; or from the family solicitor; *Doe d. Jacobs v. Phillips*, 8 Q. B. 158. In this, as in other cases, the admissibility of the evidence is for the determination of the court.

The "proper custody" means that in which the document may be reasonably expected to be found, although in strictness it ought to be in another place; thus a cartulary in the possession of the owner of a part of some abbey lands is admissible, though not owner of the greater part: in such a case the Augmentation Office will also be a proper place of deposit. *Bullen v. Michel*, 2 Price, 413; 4 Dow, 297. So a collector's book, produced from the possession either of his executor or his successor. *Jones v. Waller*, 3 Gwill. 847. So, a bond to indemnify overseers in a case of bastardy from a chest in the union workhouse. *Slater v. Hodgson*, 9 Q. B. 727. So, a document relating to a bishop's see may be produced from the custody either of his descendants or of his successors in the see. *Meath, Bp. of, v. Winchester, Ms. of*, 3 N. C. 183, Dom. Proc.; and see *Id.* 201, per Tindal, C. J.; *Doe d. Neale v. Samples*, 8 Ad. & E. 151; *Croughton v. Blake*, 12 M. & W. 205; *Doe d. Jacobs v. Phillips*, and *R. v. Mytton*, *ante*, p. 97.

In a suit for tithes by a rector against occupiers, the defendants pleaded a modus payable to the vicar for the tithes claimed. It was held, first, that the copy of the vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for the plaintiff (the bishop's registry having been searched for the original without success), and that no search was necessary either in the public Record Offices, or in the vicar's house, although it was expressed in the instrument that one part of it was to remain with the vicar;—secondly, that a terrier, appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved by the churchwardens, was admissible for the plaintiff, though produced from the custody of one who claimed the tithes in a particular district in the parish, and not from the usual depositories. *Tucker v. Wilkins*, 4 Sim. 241. The bishop's registry is the proper place for sequestrator's receipts and accounts. *Pulley v. Hilton*, 12 Price, 629.

A will of lands relating also to personal property is properly produced from a box containing the title deeds of the tenant for life of the lands. *Andrews v. Motley*, 12 C. B., N. S. 527; 32 L. J., C. P. 128. Expired leases, coming from the possession of the lessor, are admissible. *Plaxton v. Dare*, 10 B. & C. 17; *Doe d. El. Shrewsbury v. Keeling*, *supra*. Or from that of the lessee. *Hall v. Ball*, 3 M. & Gr. 242; *Elworthy v. Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42.

PROOF OF PARTICULAR DOCUMENTS.

Those classes of documents which it is most frequently required to prove at Nisi Prius, will be found classified below, under appropriate headings.

Proof of Acts and Journals of Parliament.

Acts of Parliament may be divided into four classes:—1. Public general acts; 2. Public local and personal acts; 3. Private acts, printed by the Queen's printer; 4. Private acts, not printed by the Queen's printer. This

division is only established by custom, and this a very uncertain one, at least until lately.

Formerly it was the custom to declare most local and personal acts to be public; some of these were printed by the Queen's printer with, and formed part of, the regular series of public acts; other public local and personal acts, as well as local and personal acts not public, and private acts, were not always printed. The public local and personal acts not printed were chiefly road acts.

By a resolution of both Houses of Parliament, which took effect in the year 1798 (38 Geo. 3), the public acts were divided into two series; public general acts, and public local and personal acts; and all public local and personal acts have, since that time, been printed. The other acts were all classed as private, although they included many which ought clearly to come under the denomination of local and personal; as, for instance, inclosure acts.

In 1815 a resolution was passed, under which almost all private acts—except name acts, estate acts, naturalization acts, and divorce acts—have been printed. These form a third series of printed acts.

Since 1815 it has been usual to refer to the series of public local and personal acts by small Roman figures, by way of distinction.

All public acts, whether general or local and personal, are part of the law of the land, which all tribunals are bound to notice and apply.

By the 13 & 14 Vict. c. 21, s. 7, it is provided that "every act made after the commencement of this act" (4 Feb. 1851) "shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such act."

Such acts should be, and probably are, all inserted in the series of public general, or public local and personal acts.

The printed statute book is used as evidence of a public statute, not as an authentic copy of the record itself, but as aids to the memory of that which is supposed to be in every man's mind already. *Gilb. Evid.* 6th ed. 8, 9.

By the 8 & 9 Vict. c. 113, s. 3, it is provided that "all copies of private, and local and personal acts of parliament, not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

But the marginal note of a statute in the copy so printed forms no part of the statute itself, and cannot be used to explain or construe the section; *Claydon v. Green*, L. R., 3 C. P. 511; so neither the punctuation; *Id.* p. 522, *per Willes, J.*; nor the title form part of the law; *Id.*; *R. v. Williams*, 1 W. Bl. 951. These authorities are fully supported by the parliamentary practice, as no amendments can be moved to marginal notes, stops, or title as printed in the bill. See *Hansard's Parl. Deb.*, H. Com. 20th July, 1875, pp. 1759–60. The *dicta* to the contrary of *Jessel, M. R.* in *Venour v. Sellon*, 2 Ch. D. 525, and of *Brett, L. J.*, in *R. v. Local Government Board*, 10 Q. B. D. 321, are erroneous; see *Att.-Gen. v. Gt. E. Ry. Co.*, 11 Ch. D. 460, 461, 465, *per C. A.*, and *Sutton v. Sutton*, 22 Ch. D. 513, *per Jessel, M. R.* See further on this subject *Hardcastle on Statutory Law*, Cap. iv. § 1.

If it should be necessary to prove a private act, not printed by the Queen's printer, it must be done by procuring an examined copy of the Parliament roll. B. N. P. 225. This was the way in which the journals of Parliament

were formerly proved, the printed journals not being evidence of them. *Melville's (Ld.) case*, 29 How. St. Tr. 683: *R. v. Gordon*, 2 Doug. 593. As to secondary proof of a private act, see *Doe d. Bacon v. Brydges*, 6 M. & Gr. 282.

In searching for private acts (and they are sometimes very difficult to find), Vardon's Index to the Local and Personal and Private Acts from 1798 to 1839, Bramwell's Analytical Table of the Private Statutes from 1727 to 1812, and the Index to the Statutes, Public and Private, published by the Select Committee on the Library of the House of Lords, from 1810 to 1859, will be found useful. The best collection of private acts is in the British Museum. There are also fair collections in the libraries of the Inner Temple, Lincoln's Inn, and the Incorporated Law Society.

The stat. 41 Geo. 3, c. 90, s. 9 (*post*, p. 113), provides for the proof of Irish statutes passed prior to the Union.

Proof of Proclamations and Orders.

The provisions of 8 & 9 Vict. c. 113, s. 3, *ante*, p. 99, have been extended by the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), which, by sect. 2, provides that "*primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this act by her Majesty or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this act by or under the authority of any such department of the government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes herein-after mentioned: that is to say,

- (1.) "By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation." See *The Olivia*, 1 Lush. 497, decided on 17 & 18 Vict. c. 104, s. 295.
- (2.) "By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer." See *R. v. Wallace*, 14 W. R. 462; C. C. R. Ir. This provision has been extended by the Documentary Evidence Act, 1882, (45 & 46 Vict. c. 9) s. 2, to a copy purporting "to be printed under the superintendence or authority of her Majesty's Stationery Office." The production of such evidence is *primâ facie* evidence of publication of the order. *Huggins v. Ward*, L. R., 8 Q. B. 521.
- (3.) "By the production, in the case of any proclamation, order, or regulation issued by her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connexion with such department and officer.

Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy or of extract from any proclamation, order, or regulation."

"SCHEDULE.

Column 1. <i>Names of Department or Officer.</i>	Column 2. <i>Names of Certifying Officers.</i>
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant-Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board."

This schedule has been extended by subsequent acts, as follows:—

The Education Department (33 & 34 Vict. c. 75, s. 83).	Any member of the Education Department or any Secretary or Assistant-Secretary thereof.
The Postmaster-General (33 & 34 Vict. c. 79, s. 21).	Any Secretary or Assistant-Secretary of the Post Office.

The act applies to the Local Government Board appointed under 34 & 35 Vict. c. 70, in the same way as it previously applied to the Poor Law Board (a. 5); it has also been applied to any regulation made by the Secretary of State under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 12; or the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 51; and to proclamations, &c. by the Lord Lieutenant of Ireland; 45 & 46 Vict. c. 9, s. 4. See also the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 64.

Proof of Letters Patent of the Crown.

Letters patent may be proved by production of them under the Great Seal; or by an examined copy of the original enrolment of them in the public records, *ante*, p. 92, or a copy thereof certified by the Master of the Rolls under 1 & 2 Vict. c. 94, *ante*, p. 93; or by an exemplification under the Great Seal, *ante*, p. 91. Letters patent for inventions are now sealed with the seal of the Patent Office, impressions of which shall be judicially noticed and received in evidence. 46 & 47 Vict. c. 57, ss. 12, 84.

Proof of Records and Judgments.

The proceedings of a court of record can be proved only by the record thereof; the record may be made up at any time when it becomes necessary to put it in evidence; Com. Dig. Record (A) (B); *Kemp v. Neville*, 10 U. B., N. S. 523; 31 L. J., C. P. 158; *Kelly v. Morray*, L. R. 1 C. P. 667.

In the case of a judgment prior to the J. Acts upon an issue of *nul tiel record* the proof is by the production of the original record, or by the tenor of it duly certified under a writ of *certiorari*. In case of variance the court may amend under Rules, 1883, O. xxviii, r. 1, *ante*, p. 86. See *Hunter v. Emanuel*, 15 C. B. 290; 24 L. J., C. P. 16. Where the record is in the

custody of the Master of the Rolls it seems that a copy certified under the seal of the Record Office is, under 1 & 2 Vict. c. 94, ss. 12, 13, *ante*, p. 93, as admissible in evidence as the original record. And now see Rules, 1883, O. xxxvii. r. 4, *ante*, p. 92, as to office copies and observations thereon. A criminal record may, even in civil proceedings, be proved by a certified copy under 14 & 15 Vict. c. 99, s. 13, *ante*, p. 96. *Richardson v. Willis*, L. R., 8 Ex. 69.

Where there is not an issue of *nul tiel record*, but it is necessary to prove a record in support of some allegation in the pleadings, the record is to be proved either by production of the original when complete, by an exemplification, *ante*, p. 91, or by an examined or other authenticated copy, *ante*, pp. 91, *et seq.*

Records of judgments of the superior courts at Westminster, &c.; prior to the J. Acts were not complete until entered on parchment and enrolled; B. N. P. 228; *Glynn v. Thorpe*, 1 B. & A. 153; and a copy of a judgment in paper, signed by the Master, was not evidence of the judgment, for it had not yet become permanent; B. N. P. 228; though such entry was sufficient to warrant execution. In *Fagan v. Dawson*, 4 M. & Gr. 711, the issue roll, not under the seal of the court, with a *nolle pros.* entered thereon against a co-defendant, was held insufficient proof of the *nolle pros.* It should seem that a regular entry on record was necessary. But where the pleadings did not allege any matter of record, but only averred the pendency of a judicial proceeding before the record is made up,—as that a trial was had,—the fact might be proved by the production of the *Nisi Prius* record, or indictment, with the official minutes; and, in some cases, perhaps, by mere oral evidence. *Pitton v. Walter*, 1 Stra. 162; *R. v. Broune*, M. & M. 315; *R. v. Newman*, 2 Den. C. C. 390.

In the case of a judgment under the J. Acts it is provided by the Rules, 1883, O. xli., r. 1, that "Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the cause." Forms of entering judgment are given in Appendix F. The pleadings will be filed by the officer, and under O. v., rr. 12, 13, a copy of the writ of summons will have previously been filed; and it is presumed by analogy to the former Chancery practice (*vide post*, p. 106, *et seq.*) that these documents, together with the judgment, now constitute the record, and that no enrolment is necessary. This record may in every case be proved by its production under a judge's order (*vide post*, p. 145) or under 14 & 15 Vict. c. 99, s. 14 (*ante*, p. 96), by an examined or certified copy; or perhaps by an office copy under O. xxxvii. r. 4. See observations thereon, *ante*, p. 92.

It has been held that the minute book of the clerk of the peace is not enough to prove that an indictment was preferred; nor is the original indictment itself, though endorsed as a true bill; *R. v. Smith*, 8 B. & C. 341; *per Patteson, J.*, *Porter v. Cooper*, 1 C. M. & R. 388; yet in both these cases, the allegation of the indictment was only introductory to the gist of the proceeding, which was a conspiracy to keep back a witness in one case, and an action on an agreement, after indictment found, in the other. Nor is the minute book in which the proceedings at sessions are entered, and from which the record is made up, evidence of the names of the justices in attendance at the trial of it. *R. v. Bellamy*, Ry. & M. 171. Where the record alleges an adjournment by A. and others, parol evidence may be given as to the justices actually present. S. C. The minutes of proceedings are evidence of them on a trial before the same court sitting under the same commission. *R. v. Tooke*, cited 8 B. & C. 343; *R. v. Newman*, *supra*. An

allegation that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment; *R. v. Ward*, 6 C. & P. 366; *Accord. Giles v. Siney, infra*; but where (as is usually the case) no record but the minute book is kept by the sessions, such book was admitted in evidence; *R. v. Yeoveley*, 8 Ad. & E. 806.

As to proof of a conviction or acquittal now see 14 & 15 Vict. c. 99, s. 13, *ante*, p. 96. And as to proof of conviction in order to discredit a witness, see C. L. P. Act, 1854, s. 25, cited *post*, *Proof by witnesses*, p. 173.

It is the duty of a justice of the peace to return all convictions before him to the Quarter Sessions to be filed among the records of that court; 11 & 12 Vict. c. 43, s. 14; see *Ex pte. Hayward*, 3 B. & S. 546; 32 L. J., M. C. 89; and such conviction can be proved only by the production of the record thereof or an examined copy; *Hartley v. Hindmarsh*, L. R., 1 C. P. 553; *Accord. Giles v. Siney*, 13 W. R. 92, M. T. 1864, Q. B. In *L. School Board v. Harvey*, 4 Q. B. D. 451, an entry in the minute book of a summary conviction for non-compliance with a previous order was held to be evidence of such non-compliance: *sed quere*. The point does not appear to have been argued in *R. v. Hutchins*, 5 Q. B. D. 353; 6 Id. 300, C. A. In *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267, a bastardy order, made by two deceased magistrates, was admitted in evidence on proof of their handwriting, on the ground that it was an official minute of the proceedings made in discharge of their judicial duty; as to the purpose for which it was so admitted, *vide post*, p. 195.

A condemnation by any justice under the Customs Laws, may be proved by production of a certificate thereof purporting to be signed by the justice, or by an examined copy of the record of such condemnation certified by his clerk. 39 & 40 Vict. c. 36, s. 263.

Where an ancient record of a judgment has been lost, it may be proved to the jury by parol or other testimony; as where the rolls of a court of a manor of ancient demesne had been destroyed, an old copy of a recovery in it under the hand of the steward was admitted without other proof, the possession having long gone according to it. *Green v. Proude*, 1 Mod. 117; S. C., 1 Vent. 257. So the enrolment of the decree respecting London tithes under the 37 Hen. 8, c. 12, being lost, has been proved by user. S. C.; *Macdougall v. Young*, Ry. & M. 392.

On a question whether a decree in equity has been reversed by the House of Lords, a copy of the minutes of the judgment in the Journals is evidence; *Jones v. Randall*, Cowp. 17; and now see 8 & 9 Vict. c. 113, s. 3, *ante*, p. 100. But as a judgment of the House on error or appeal from the superior courts of common law, was entered of record, it would seem that in such case the minutes would not be sufficient. See also C. L. P. Act, 1852, ss. 155, 157. Under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), this distinction, however, is now abolished, and it seems that any judgment of the House given since 1875 (see J. Act, 1875, s. 2), may now be proved by a copy of the minutes in its Journals.

As to proof of judgments, &c., of inferior courts, *vide post*, p. 111.

Proof of Fines and Common Recoveries.

A common recovery is proved in the same manner as the record of a judgment in an adverse suit.

The chirograph or indenture of a fine, as formerly delivered by the chirographer, is the proper evidence of it. B. N. P. 229. But it has been held that the indorsement of proclamations on it is not evidence of them, because he has no official authority to deliver a copy of such indorsement. B. N. P. 230; *Doe d. Hatch v. Bluck*, 6 Taunt. 485. The original entry of the pro

clamations was usually filed with the *note* of the fine, and was in the custody of the chirographer, and this "*note*" is said to be the "*principal ertificate*," from which others are amendable. 3 Leon. 183. Besides these records, the proceedings on a fine were formerly enrolled in the Court of Common Pleas under statutes 5 Hen. 4, c. 14, and 23 Eliz. c. 3; and it should seem, on principle, that examined copies of these enrolments of record when found, or office copies stamped with the seal of the Record Office (1 & 2 Vict. c. 94, *ante*, p. 93), are legitimate evidence. The foot or *pes finis*, is a third counterpart of the indentures made by the chirographer, and originally engrossed on the same parchment. The entry of the proclamations on this is official, and the proper custody of it was, until lately, that of the *Custos brevium*. The result appears to be that there are several authentic records of fines, which show exactly the same facts, viz., the date, parties, property, concord, and proclamations. It must, however, be remembered that the practice and form of levying fines have undergone variations at different periods. See generally, on the mode of recording fines, 5 Rep. 39 a., and 2nd Report of Deputy Keeper of Records, Appendix 1.

By 5 & 6 Will. 4, c. 82, other officers were substituted for the chirographer, whose copies were made as available as the old ones, and all the records of fine (with a few recent exceptions) are now in the custody of the Master of the Rolls, under 1 & 2 Vict. c. 94. The 11 & 12 Vict. c. 70, enacted that all fines levied in the Common Pleas should be conclusively deemed to have been levied with proclamations, except where, at the passing of the act (31st of August, 1848), the land was actually enjoyed under a title inconsistent with such fine. The act was expressly designed to save the expense of other proof of proclamations. It is remarkable, however, that it proceeded on the false supposition that "all fines" had previously been levied with proclamations.

In the case of Welsh fines there is a special statute to facilitate the proof of them. See 4 Vict. c. 32, s. 2, and *Doe d. Cadwalader v. Price*, 16 M. & W. 603.

Proof of Verdicts.

When a verdict is offered as evidence of the truth of the facts found, the *postea* alone was not sufficient, but the judgment must also have been proved to show that it had not been arrested, nor a new trial granted; *Pitton v. Walter*, 1 Stra. 162; B. N. P. 234; except in the case of an issue, when no judgment was entered up; B. N. P. 234. But *semb.* the verdict should in that case have been shown to have been satisfactory by proof of the decree, or other adoption by the court. *Ibid.* See *Robinson v. Duleep Singh*, 11 Ch. D. 798, C. A. As to proof of the judgment, see *ante*, pp. 101, 102. The Nisi Prius record with the *postea* indorsed, or with minute of the verdict indorsed by the officer of the court, was sufficient where the only object is to show that the cause came on to be tried. *Pitton v. Walter, supra*, *R. v. Browne*, M. & M. 315. But, without such minute, the Nisi Prius record alone was no evidence of the trial. *Per* Lord Tenterden, C. J., *Ibid.*

Under Rules, 1883, O. xxxvi., r. 30, two copies of the pleadings in the action are delivered to the officer when the action is entered for trial, one of which is for the use of the judge at the trial; this delivery corresponds with the former delivery of the N. P. record (see O. xxvi. r. 1), and by r. 41, "the associate or master shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment," in a book to be kept for the purpose. Under r. 42, where the judge directs any judgment to be entered for any party absolutely, judgment may

be entered on a certificate given by the associate in Form 17, App. B.; this certificate seems to correspond to the *postea*.

Proof of Writs.

A writ must be proved by a copy of the record of it after its return; and this is said to be necessary whenever it is the gist of the action, (*i.e. ut semble* wherever it is treated as matter of record in the pleading); L. N. P. 234; otherwise the writ itself may be produced; or secondary evidence given, when its non-production is accounted for. A copy of the judgment-roll containing an award of an elegit and the return of the inquisition is evidence (and *ut semble* the best evidence) of the elegit and inquisition. *Ramsbottom v. Buckhurst*, 2 M. & S. 565. To prove that the defendant issued a writ, it is not sufficient secondary evidence to produce the filacer's book unless it be shown that it has not been returned but is in the defendant's hands, who has had notice to produce it. *Edmonstone v. Plaisted*, 4 Esp. 160. Where a writ is pleaded in terms, and *nul tiel record* is replied, it must be proved by the production of the record, as in other cases of records; *ante*, pp. 101, 102. As to proof by office copy, see Rules, 1883, O. xxxvii. r. 4, and observations thereon, *ante*, p. 92.

A writ of summons may be proved by production of the original writ. Or by the copy thereof left with and filed by the officer under Rules, 1883, O. v., rr. 12, 13. *R. v. Scott*, 2 Q. B. D. 415. If the defendant has to prove the writ, it should seem that the copy served on him by the plaintiff is primary evidence; *vide ante*, p. 3.

Proof of Inquisitions.

Where the return to an inquisition is given in evidence, it is in general necessary to show that the inquiry was made under proper authority. On this head some distinctions are observable. Inquests of office are either by commission under the Great Seal, as offices of entitling, &c.; or by commission or writ under the seal of the Exchequer; or they are taken *ex-officio*, as by coroners, escheators, &c. The returns made under any of the above special commissions, or writs, are generally inadmissible as evidence, unless the commission be proved, or the non-production of it accounted for. But inquisitions taken *ex-officio* by officers acting under a general commission or appointment, as escheators, &c., seem to be admissible on principle, without further evidence of authority than that they were acting as such officers. See generally as to the nature of inquests of office, 3 Bl. Com. 258; 16 Vin. Ab. 79, tit. *Office*.

In the case of an inquisition *post mortem*, and such private offices, the return cannot be read without also reading the commission under which it was taken; unless, as it seems, the inquisition be old. 12 Vin. Ab. Ev. (A. b. 42). In cases of more general concern, such as the return to the commission in Henry VIII.'s time to inquire of the value of livings, the commission is said to require no proof. B. N. P. 228. So an ancient extent of crown lands found in the proper office, purporting to have been taken by a steward of the king's lands, and following in its form the direction of the statute 4 Edw. 1, stat. 1, will be presumed to have been taken under competent authority, though the commission cannot be found. *Rove v. Brenton*, 3 M. & Ry. 164; S. C., 8 B. & C. 747. And there are many cases to show that an old commission may be presumed: see references, S. C., 3 M. & Ry. 171, 349. The book called Domesday is an inquest of this kind. An inquisition is admissible though it has become illegible in material parts. *Anderton v. Magawley*, 3 Bro. P. C. 208. A lost inquisition *post mortem*.

may be proved by a recital of it in ancient proceedings, as on a petition of right in the *Coram Rege* roll, where it was incidentally certified *verbatim* to the court of K. B. and set forth on the record. *Rowe v. Brenton*, 3 M. & Ry. 141, 142.

Proof of Rules or Orders of Court, and Judge's Orders.

An order (in the common law courts formerly called a rule) of a superior court, is proved by an office copy thereof, for such a copy is the order itself. *Per Cur. Streeter v. Bartlett*, 5 C. B. 564; *Selby v. Harris* 1 Ld. Raym., 745; *Ludlow v. Charlton*, 9 C. & P. 242. Where a court (as that of Insolvent Debtors) prints and circulates copies of its general rules for the guidance of its officers, one of such copies is evidence of the rules, without showing it to have been examined with the original. *Dance v. Robson*, M. & M. 294. But the rules must be shown to have been sanctioned by the court in order to support an indictment for perjury on an affidavit required by them. *R. v. Koops*, 6 Ad. & E. 198.

A judge's order may be proved either by producing the order itself signed by the judge, and delivered out in the usual way; or by proof of the rule or order, if any, making it a rule or order of court. *Still v. Halford*, 4 Camp. 17. An order of court, however, is not matter of record in the strict sense of the word. *R. v. Bingham*, 3 Y. & J. 101. The statute 8 & 9 Vict. c. 113, s. 2 (*ante*, p. 78), enacts that all courts are to take judicial notice of the signature of the superior judges of equity and common law attached to an official or judicial document; and by 46 & 47 Vict. c. 52, s. 137 (*ante*, p. 78), this provision is extended to the signatures of judges and registrars of courts having jurisdiction in bankruptcy.

Proof of Decrees and Answers in Chancery.

A decree in Chancery may be proved by an exemplification; or by an examined copy; or by production of a decretal order in paper, together with proof of the bill and answer, where such proof may be necessary. *Trowel v. Castle*, 1 Keb. 21; B. N. P. 244. The bill and answer need not be proved if they are recited (as they formerly were) in the decree. *Ibid.*; Com. Dig. Testin. (C. 1); *Accord. Wharton Peerage*, 12 Cl. & Fin. 295. The rule laid down in a text-book of authority is, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral act (as that a decree was made by the court), he ought regularly to give in evidence the proceedings on which the decree was founded. 1 Phill. Ev. 373. And see Peake, Ev. 74; *Hewitt v. Piggott*, 5 C. & P. 75. Still, if the decree or order itself contains all the facts required, it has been held unnecessary to produce the bill and answer, though it is otherwise where it is material to show the particular issue raised. Thus, in an action against the sheriff for an escape under an attachment issued out of Chancery for non-payment of costs, the order for an attachment is *prima facie* proof of the pendency of a suit in Chancery without proof of bill and answer; and for this purpose a decree, even without a recital or other evidence of bill and answer, would be admissible. *Blower v. Hollis*, 1 Cr. & M. 396. This case was doubted at Nisi Prius by Ld. Abinger, C. B., in *Attwood v. Taylor*, 1 M. & Gr. 289, 290, where the vendor of an estate sued the vendee for interest due on the contract of sale, and the plaintiff, in order to account for laches in suing, offered in evidence an injunction in a suit of Equity by the defendant against him, restraining him from suing at law; his Lordship refused to admit the order until the bill and answer were produced. The case seems to be reconcilable with *Blower v. Hollis*, *supra*, and it is possible

that Lord Abinger only dissented from the *marginal* note of the case in the above report of it. It might be that the injunction was obtained on grounds which did *not* relieve the plaintiff from his imputed laches. As to proof of the reversal of a decree, see *ante*, p. 103. As to proof of judgments of the High Court of Justice, *vide ante*, p. 102.

An answer in Chancery is proved by the production of the bill and answer, or by examined, or Record office, copies of them; but on proof by the proper officer that the bill has been searched for in the proper office and not found the answer may be read without the bill. *Gilb. Ev.* 55. A distinction was sought to be drawn between proof of answers, filed in Chancery, and affidavits, but the distinction is untenable, *vide post*, pp. 108, 109. Some proof of the identity of the parties is requisite. *Rees d. Howell v. Bowen*, M'Cl. & Y. 383, 391, 392. This may be given by a witness, who has seen the handwriting of the defendant to the original answer, though it is not produced in court. *Dartnall v. Howard*, Ry. & M. 169. Identity may also be inferred from intrinsic evidence; as if the name, description, and character of the party to the action agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity. *Hennell v. Lyon*, 1 B. & A. 182. See also *Garvin v. Carroll*, 10 Ir. L. R. 330, and the recent case of *Hubbard v. Lees*, L. R. 1 Ex. 255, 257 (cited *post*, p. 118, decided on a family register), whence it seems that such evidence is sufficient for the jury, and where the jury are satisfied with the identity the court will not interfere. See, however, *Rees d. Howell v. Bowen*, *supra*; *Burnand v. Nerot*, 1 C. & P. 578; and *Proof of Deeds, &c.*, *post*, p. 127.

An answer, offered in evidence as an admission of the party on oath, is sufficiently proved by an examined copy of it without proof of a decree, or of the party's handwriting. *Dartmouth, Ly. v. Roberts*, 16 East, 334. See *Fleet v. Perrins*, L. R. 3 Q. B. 536, *post*, p. 108. So when it is used to contradict the party making it, or to cross-examine him on it, *vide post*, pp. 168, 169. A letter written by the plaintiff's agent, referred to by the plaintiff in his answer to a bill in Chancery filed by a third person, and deposited by consent of parties with a clerk in court, was evidence against the plaintiff in an action at law, without reading the answer in Chancery. *Long v. Champion*, 2 B. & Ad. 284. But *quere*, whether—where A. had obtained sight of a letter or document of B. by means of a bill of discovery, to which B. had put in an answer *with the document annexed*—A. could read it in evidence without also reading the whole answer? See S. C. The mere fact that the document was obtained by a bill of discovery is not enough to exclude it, or to oblige the party who uses it to put in the bill and answer. *Sturge v. Buchanan*, *per Cur.*, 10 Ad. & E. 605.

Where an answer is read as a mere admission by the defendant, he has hitherto been entitled to require that as well the bill as the interrogatories shall be also read as part of the plaintiff's case. *Pennell v. Meyer*, 2 M. & Rob. 98. The principle is, that the questions as well as answers should be read, and that in equity a defendant was bound to answer not only the interrogatory part, but also the narrative part of the bill. *Ibid.* But defendants in equity were relieved by the Gen. Order, 26 Aug. 1841, and by the Act 15 & 16 Vict. c. 86, s. 12, from answering except to interrogatories. This might perhaps dispense with the reading of anything but the interrogatories; but as the answer was not necessarily confined to the interrogatories (see sect. 14), it is still a question how far the reading of the bill, if required by the defendant, may be necessary? See *Fleet v. Perrins*, L. R., 3 Q. B. 536; L. R., 4 Q. B. 500, Ex. Ch., and *Admissions on compulsory process*, *ante*, p. 60. Where a bill, answer, and decree are put in evidence to prove a fact which appears on the face of those documents to have been in issue, the

party producing them is not bound also to put in the depositions as part of his own case. *Laybourn v. Crisp*, 4 M. & W. 320.

Proof of Depositions and Affidavits.

A deposition used by a party to a suit in Chancery, for the purpose of proving certain facts, is primary evidence of the same facts against the same party in an action by a stranger. *Richards v. Morgan*, 4 B. & S. 641; 33 L. J., Q. B. 114. But such depositions are not, in general, admissible without proof of the bill and answer; B. N. P. 240; Gilb. Ev. 62; unless no bill or answer can be found; Gilb. Ev. 64; *Rowe v. Brenton*, 8 B. & C. 765; *Byum v. Booth*, 2 Price, 234, n.; *Bayley v. Wylie*, 6 Esp. 85; or unless the depositions are offered in evidence as containing an admission merely, or for the purpose of contradicting a witness. 1 Phill. Ev. 375. The bill and answer are only required to satisfy the judge that the depositions are admissible by enabling him to see what was in issue; and the opposite counsel therefore has no right to have them read, or to comment upon them to the jury. *Chappell v. Purday*, 14 M. & W. 303.

In general, depositions taken in *perpetuam rei memoriam* were not evidence at law unless an answer had been put in and proved; but if the defendant in equity were in contempt, or had neglected to take advantage of an opportunity to cross-examine, the deposition might be read on proof of the bill, without the answer; B. N. P. 240; *Lancaster v. Lancaster*, 6 Sim. 439; so in case of a bill filed for a commission to examine witnesses *de bene esse*; *Cazenove v. Vaughan*, 1 M. & S. 4. Whether the deposition was taken on a bill to perpetuate testimony, or a bill to examine *de bene esse* (which are distinct proceedings), it was not evidence without proof of the death or inability of the witness to attend; but a court of equity might have made a special order to read it without such proof, and without proof of the bill, answer, or other proceedings. See Jeremy's Equity Jurisdiction, 271, 280, and the authorities there cited.

Affidavits taken by the standing commissioners of the superior courts may be proved without producing the commission. The acting as such is *prima facie* sufficient proof of it. *R. v. Howard*, 1 M. & Rob. 187. The handwriting of the commissioner must be proved, and that of the deponent, if the original is produced. But if the affidavit be filed in a superior court of law or equity an examined copy, or (in the same court and cause), an office copy of it, is in civil cases evidence against the party by whom it has been used or acted on, without proof of the handwriting of the person making it. *Fleet v. Perrins*, L. R., 3 Q. B. 536; L. R., 4 Q. B. 500, Ex. Ch.; B. N. P. 229. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies, and observations thereon, *ante*, p. 92. It has even been held that an examined copy of the affidavit of a defendant, used by him in a cause and filed, was sufficient evidence of the affidavit on an indictment for perjury. *R. v. James*, 1 Show. 397; and see 3 Doug. 78, n.; although the present practice seems to require that the original affidavit should in such a case be produced; 2 Taylor Evid. § 1379. Where an examined copy was offered in evidence of an affidavit filed in Chancery in another cause, and alleged to have been made by the defendant, but not shown to have been used or acted on by him, it was held inadmissible without proof of the deponent's identity with the defendant. *Rees d. Howell v. Bowen*, M'C'l. & Y. 383. In this case a distinction was taken by the court between answers which formed part of the records, and were not allowed to be removed from the files of the court, and affidavits which could be removed. But no such distinction in fact exists, for the affidavits form as

much part of the proceedings as the answer. *Garvin v. Carroll*, 10 Ir. L. R. 330, *per* Crampton, J. And on the ground that examined copies are good evidence in civil cases at law, the Court of Chancery will not allow its documents to be removed except in aid of criminal prosecutions. *Att.-Gen. v. Ray*, 6 Beav. 335; 1 Daniell's Chan. Prac. 5th ed. 769. It seems, therefore, that a deposition or affidavit filed in the course of Chancery proceedings is to be proved in the same way as an answer; *vide ante*, pp. 106, 107.

Under the act 15 & 16 Vict. c. 86, the examination or testimony of parties or witnesses in equity was taken either orally before an examiner; or by answers to interrogatories; or by affidavits sworn before persons qualified to take them. The parties to the suit were examined under interrogatories filed in the record office of the court, to which the answers were also returned. See sects. 12, 19, 25. Oral examinations were reduced to writing by the examiner in a narrative form, and returned, with the proper examinations, to the same office. Sects. 31, 32, 34. Office copies of examinations are delivered under sect. 4. It should seem that these office copies, *purporting* to be signed and certified as true copies by the proper officer, are admissible as evidence in all courts by stat. 14 & 15 Vict. c. 99, s. 14; *ante*, p. 96.

The question as to whether a witness can be cross-examined on an examined or office copy of an affidavit or other document filed in court is considered under *Cross-examination of witnesses*, *post*, p. 168.

As to proof under the J. Acts by affidavit or depositions in the action, *vide post*, p. 174, *et seq.*

By Rules, 1883, O. xxxi. rr. 1, 4, 8, either party may, by leave of a judge, deliver interrogatories to the opposite party, which he is bound to answer by affidavit within ten days. Where relief is sought on the ground of fraud or breach of trust no such leave is required. An office copy of the answer to the interrogatories will, as against the party making it, be sufficient evidence of the answer at the trial; see *Fleet v. Perrins*, L. R., 3 Q. B. 536; L. R., 4 Q. B. 500, Ex. Ch. cited, *ante*, p. 108, although the answering party may, if he think fit, put in evidence the interrogatories to which the answer is made. S. C. If the answer is not in the same court and cause an examined copy of the answer will be sufficient evidence. S. C. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies, and observations thereon, *ante*, p. 92. It seems that such examined or office copy will be admissible for the purpose of cross-examination or contradiction of the deponent; *vide post*, pp. 168, 169. In case of an insufficient answer, the party interrogated may, by r. 11, be ordered to be examined orally. A party may be examined as to a lost document; but the loss must be proved at the trial. *Wolverhampton Waterworks Co. v. Hawksford*, 5 C. B., N. S. 703; 28 L. J., C. P. 198. By r. 24, "Any party may at the trial of a cause, matter or issue, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories without putting in the others, or the whole of such answer: provided always that in such case the judge may look at the whole of the answers" and order answers connected with those put in, also to be put in.

By O. lxv., r. 54, the copy of an affidavit of discovery of documents, "delivered by the party filing it may be used as against such party."

Proof of Oral Testimony on a former Trial.

What a witness, since dead, has sworn on a trial between the same parties may be given in evidence either from the judge's notes, or from notes that

have been taken by any other person who will swear to their accuracy ; or it may be proved by any person who can swear from memory. *Per Mansfield, C. J., Doncaster, Mayor of, v. Day*, 3 Taunt. 262 ; *Strutt v. Bovingdon*, 5 Esp. 56. The witness must be prepared to prove the words of the former witness, and not merely the supposed substance or effect of them. *Ennis v. Donisthorpe*, 1 Phil. Ev. 219, 6th ed. ; *R. v. Jolliffe*, 4 T. R. 285. As to when this evidence is admissible, see *Effect of depositions and examinations in other suits*, post, p. 189.

Proof of Proceedings in the Ecclesiastical and Admiralty Courts.

The minute book of the Consistory Court is said to have been admitted as evidence of a decree for alimony. *Houlston v. Smyth*, 2 C. & P. 25 ; *semb. acc. Leake v. Westmeath*, 2 M. & Rob. 396. And a sentence of separation *à mensâ*, &c., was admitted by Lord Kenyon *dubitanter* without proof of the libel. *Stedman v. Gooch*, 1 Esp. 3. So the sentence of an admiralty court was held evidence of a condemnation without producing the libel and answer, at least if not found, or not unusually filed with it. *Per Trevor, J., in Wheeler v. Louth*, Com. Dig. Testm. (C. 1). But it seems questionable whether a sentence in either of these courts is generally admissible without proof of the previous proceedings in the suit. In the *Kingston's (Ds. of) case*, 20 How. Sta. Tri. 377, on objection taken to the reading of the sentence in a jactitation suit without the libel, allegations, and all other proceedings in it, they were all put in evidence. In *Cleeve v. Att.-Gen.*, Somerset Sum. As. 1841, where defendant put in a suit for subtraction of tithe in order to disprove a *modus*, Rolfe, B., required that the depositions, which had been found and were produced with the rest of the proceedings by the registrar, should also be read. In *Leake v. Westmeath*, 2 M. & Rob. 394, Tindal, C. J., refused to admit a decree for alimony to be given in evidence without proof of all the prior proceedings,—namely, the libel, answer, and defensive allegations,—and where a decree was affirmed on appeal to the Arches, his lordship required that the process of appeal should be duly proved by a transcript of the proceedings below, in order to make the decree of the superior court admissible ; but he expressed an opinion that the *depositions* filed need not be produced. The action there was by the attorney of the defendant's wife, who had acted for her in the various proceedings in the matter of her divorce *à mensâ*, &c., and her claim of alimony ; and the evidence of the divorce was put in by the plaintiff in order to show that she was living apart justifiably, and so to fix defendant with liability. The plaintiff recovered a verdict subject to a case. This holding seems to be, in part at least, at variance with *Stedman v. Gooch*, *supra*, and perhaps neither case can, under the circumstances, be taken as an authoritative decision. Tindal, C. J., treated the judgment of the ecclesiastical court on the same footing as a decree in Chancery in respect of the evidence of it. See *Phillips v. Crawly*, Freeman, 83, 84 ; *Laybourn v. Crisp*, 4 M. & W. 320, cited *ante*, p. 107.

By 20 & 21 Vict. c. 85, the Court for Divorce and Matrimonial Causes was established, in which all jurisdiction in such causes was vested, and that of the Ecclesiastical Courts abolished, except as to granting marriage licences. By sect. 13, this court had a seal, and all decrees and orders, or copies thereof, sealed with it "shall be received in evidence." The language of this section differs from that of the Probate Court Act (20 & 21 Vict. c. 77), sect. 22 (*post*, p. 112), and does not expressly make the seal prove itself, though the courts are bound to notice that the court has a seal. But

the 8 & 9 Vict. c. 113, s. 1 (*ante*, p. 94), seems to render any proof of the seal unnecessary. The proceedings in this court were by petition, citation, and answer; and the decree was recorded in the court book, and may be proved either under the above clause, and, *ut semble*, by the usual proofs of entries in public books, as to which, *vide ante*, p. 91, *et seq.* The jurisdiction of this court has been transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division, but the old forms and proceedings are retained; J. Act. 1873, s. 18.

Proof of Judgments in Inferior Courts.

The judgment of a county court, court baron, or other inferior jurisdiction, may be proved by production of the book or rolls, containing the proceedings of the court from the proper custody; and if not made up in form, the minutes of the proceedings will be evidence or an examined copy of them. *R. v. Hains*, Comb. 337; 12 Vin. Ab. (A. b. 267); *Hennell v. Lyon*, 1 B. & A. 182; *R. v. Smith*, 8 B. & C. 341; *Dawson v. Gregory*, 7 Q. B. 756. But this rule does not extend to proceedings of the court of quarter sessions, on the crown side, which is a court of oyer and terminer, and is not an inferior court. *R. v. Smith*, *supra*. As to proof of convictions before justices, *vide ante*, pp. 102, 103. In proving the judgment of an inferior court, as the old county court, evidence should also be given of the proceedings previous to judgment. Com. Dig. Testm. (C. 1). See *Fisher v. Lane*, 2 W. Bl. 834; *Thompson v. Blackhurst*, 1 Nev. & M. 266.

By the County Courts Act, 9 & 10 Vict. c. 95, s. 111, the clerk's (Registrar's) book kept under the Act, or copies of entries in it, bearing the seal of the court, and purporting to be signed and certified as true copies by him, shall be admitted as evidence of the entries and proceedings referred to in them, and of the regularity of the proceedings, without any further proof. The clause does not seem to dispense with proof of the seal; but perhaps this is cured by 8 & 9 Vict. c. 113, s. 1, *ante*, p. 94, or by 14 & 15 Vict. c. 99, s. 14, *ante*, p. 96. See further, *Dewes v. Riley*, 11 C. B. 434; 20 L. J., C. P. 264; *Harmer v. Bean*, 3 Car. & K. 307.

Proof of Probates and Letters of Administration.

Where the title to personal property under a will is in question, the original will cannot, in general, be read in evidence; but the probate must be produced. *R. v. Barnes*, 1 Stark. 243; *Pinney v. Pinney*, 8 B. & C. 335; *Pinney v. Hunt*, 6 Ch. D. 98. The probate is sealed with the seal of the court, *vide infra*. But the probate is not the only evidence of the will: for the probate itself, as also letters of administration *cum testamento*, &c., are only certificates that the will has been proved, and other evidence of equal authority can always be obtained; thus the Act Book of the Ecclesiastical Court, containing an entry of the will having been proved and of probate granted to the executors therein named, is admissible evidence of executorship, without accounting for the non-production of the probate. *Cox v. Allingham*, Jacob, 514. An examined copy of the Act Book is also evidence since Act 14 & 15 Vict. c. 99, s. 14, *ante*, p. 96; *Dorret v. Meux*, 15 C. B. 142; 23 L. J., C. P. 221; and it was so before that Act; see *Davis v. Williams*, *post*, p. 112. And the original will with an indorsement or note at the foot of it by the surrogate and deputy registrar is primary evidence of probate, when no other record of it is kept. *Doe d. Bassett v. Mew*,

7 Ad. & E. 240. See also *Gorton v. Dyson*, 1 B. & B. 219, and *Waite v. Gale*, 2 D. & L. 925.

These cases are put on the ground that the record in the Ecclesiastical Court is primary evidence of the will, and so it would seem that no secondary evidence would be admissible until both the non-production of the probate and the non-production of any other record of the Ecclesiastical Court had been accounted for.

It was said by Holt, C. J., in *Hoe v. Nelthorpe*, 3 Salk. 154 ; S. C. *sub. nom.* *Hoe v. Nathorp*, 1 Ld. Raym. 154, that the copy (of course, examined) of a probate of a will is good evidence, because the probate is an original taken by authority ; but this view has not generally been adopted, though it is not altogether inconsistent with principle. Where the probate of a will is admissible in evidence under 20 & 21 Vict. c. 77, s. 64, *post*, p. 141, in proof of a devise of real estate, a copy stamped with any seal of the Court of Probate (or now of the Probate Division of the High Court, *vide infra*), is rendered equally admissible by the section.

If the probate is lost, it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, 1 Stra. 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Court is good evidence where no other record is kept. *Ramsbottom's case*, 1 Leach, C. C. 4th ed., 25, n. (b). As to the authority of the probate, and the manner in which it may be impeached in evidence, see *Effect of Probate, &c.*, *post*, p. 192.

Administration is proved by the production of the letters of administration, or of a certificate or exemplification thereof, granted by the Ecclesiastical Court ; *Kempton v. Cross*, Cas. temp. Hardw. 108 ; B. N. P. 246 ; or, without producing the letters of administration, by the original book of acts recording the grant of the letters. *Ibid.* *Elden v. Keddell*, 8 East, 187. It is said that the seal of the Ecclesiastical Court proves itself, and *Kempton v. Cross*, *supra*, is cited in the text books for that purpose ; but the case only shows that the act of the Prerogative Court under its seal will be credited by the courts of law ; and not that the seal itself requires no proof. It would be a strong thing to require the courts to take notice of the seals of some hundreds of local and limited probate courts which existed in the kingdom. *Vide ante*, pp. 76, 77. An examined copy of the Act book, stating the grant of letters of administration to the defendant, is proof of his being administrator, without notice to produce the letters. *Davis v. Williams*, 13 East, 232. See further, *Williams on Executors*, Pt. v. Bk. 1, Ch. 1.

By the act for establishing the Court of Probate (20 & 21 Vict. c. 77), s. 22, seals were provided for the court : *i.e.* for the principal and district registries, "and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof." See also sect. 64, *post*, p. 141. The court was a court of record (sect. 23) ; and its jurisdiction has been transferred to the High Court of Justice, by the J. Act, 1873, s. 16, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. See *Pinney v. Hunt*, 6 Ch. D. 98.

Proof of Court Rolls.

In order to prove the title of a copyholder, the court rolls may be produced without producing the stamped copy ; *Doe d. Bennington v. Hall*, 16

East, 208 ; or they may be proved by examined copies ; *Doe d. Cavothorn v Mee*, 4 B. & Ad. 617 ; *Breeze v. Hawker*, 14 Sim. 350 ; but by the Stamp Act, 1870, s. 81 (2), the entry on the court rolls of a surrender or grant is not available as evidence thereof, unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll, if made in court, is duly stamped ; but this is sufficiently proved by a certificate of the steward on the margin of the entry. See further *post*, *sub tit.*, *Stamps, Copyhold and customary estates*, where the cases decided under the former Stamp Acts are collected. The title may also be proved by the stamped copy delivered and signed by the steward. Co. Litt. s. 75 ; Scriven, Copyh., 5th ed. 350, 351 ; Peake Evid. 94. And where an admittance is more than 30 years old, proof of the signature of the steward is unnecessary ; *Ely, Dean and Chapter of, v. Stewart*, 2 Atk. 45 ; *Rowe v. Brenton*, 3 M. & Ry. 296 ; but see *Somerset, Duke of, v. France*, Fortescue, 43. Whether court rolls of a manor may be proved by a copy certified by the steward having them in his custody, under stat. 14 & 15 Vict. c. 99, s. 14, *ante*, p. 96, is open to question. The rolls need not be signed by the steward. *Bridger v. Huett*, 2 F. & F. 35. A surrender and presentment may be proved by the draft of an entry, produced from the muniments of the manor, and the oral testimony of the foreman of the homage jury who made the presentment. *Doe d. Priestley v. Calloway*, 6 B. & C. 484. And such a draft is admissible though there may have been a subsequent regular enrolment. *Ibid.* 495. And if the original roll is put in, it may be shown to be incorrect by producing the minute of the steward, or by other evidence. *Ibid.* 494 ; Scriven, Copyh., 5th ed. 137, 138, 353. Where a surrender was made in 1774, and there was no record of it on the court rolls, the books of the manor containing a record of the admission, which recited the surrender, were received as evidence of the surrender. *R. v. Thruscross*, 1 Ad. & E. 126. As to proof of a recovery in a manor of ancient demesne, see *Green v. Proude*, 1 Ventr. 257, cited *ante*, p. 103. A presentment in a manor book will not be rejected because part of it has been cut off, there being no ground for supposing the mutilation to be fraudulent. *Evans v. Rees*, 10 Ad. & E. 151.

Proof of Proceedings in Bankruptcy.

The proof of these proceedings will be found *post*, Part III., *sub tit.* *Actions by Trustees of bankrupts.*

Proof of Foreign Law.

The courts cannot take cognizance of the laws of foreign states : they must be proved as facts. *Mostyn v. Fabrigas*, Cowp. 174 ; *Sussex Peerage case*, 11 Cl. & F. 114–117. The laws of Scotland—*Male v. Roberts*, 3 Esp. 163 ; *Woodham v. Edwards*, 5 Ad. & E. 771 ; *R. v. Povey*, *post*, p. 114 ; of the Channel Islands ; *Brenan's case*, 10 Q. B. 492, 498 ; and of the colonies ; *Astley v. Fisher*, 6 C. B. 572 ; *Wey v. Yally*, 6 Mod. 194 ; *The Peerless*, Lush. 103 ; 29 L. J., P. M. & A. 49—fall within this rule ; though in an appeal from a colonial court, the judicial committee of privy council must take judicial cognizance of the laws of the colony. But as the laws of Ireland are substantially the same as those of England they would probably now be noticed. See *Reynolds v. Fenton*, 3 C. B. 187, 191 ; *per Maule, J.*, explaining *Ferguson v. Mahon*, 11 Ad. & E. 179. By stat. 41 Geo. 3, c. 90, s. 9, the copy of the statutes of the kingdom of Ireland, made

by the parliament there, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland, prior to the union, in any court of civil or criminal jurisdiction in Great Britain. As to the manner of proving the ancient Welsh laws, see *Att.-Gen. v. Jones*, 2 H. & C. 347, 354, n.; 33 L. J. Ex. 249, 257, n.

It was formerly laid down that the written law of a foreign state should be proved by a copy duly authenticated. *Clegg v. Levy*, 3 Camp. 166; *Picton's case*, 30 How. St. Tr. 491. But this doctrine has been overruled on a trial at bar, in which oral evidence of a foreign advocate was admitted to prove a decree of the National Assembly of France, 1789. *De Bode's case*, 8 Q. B. 208. And in the *Sussex Peerage case*, ante, p. 113, it was held that the law is properly receivable *only* from such oral evidence, although a witness may refresh his own memory from the written law. A French vice-consul has been admitted to prove the French written law of marriage by referring to a printed edition of the Cinq Codes, and by his own testimony: *Lacon v. Higgins*, 3 Stark. 178; S. C. Dowl. N. P. 38; and a practising advocate attached to the consulate was admitted to prove the French law of bills of exchange. *Trimbey v. Vignier*, 1 N. C. 151.

Foreign law should be proved by witnesses of competent skill; thus a tobacconist was rejected as a witness of the law of Scotland respecting marriage, cited in *R. v. Bampton*, 10 East, 287. See also *R. v. Povey*, Dears. 32; 22 L. J., M. C. 19. But the Jewish marriage law has been allowed *ex necessitate* to be proved by persons in trade, and of inferior station. *Lindo v. Belisario*, 1 Hagg. Con. Rep. 216. And it has since been held that experience as a legal practitioner was in certain cases not necessary, and that a witness who was formerly a merchant and stock-broker in Belgium might be received as competent to inform the court on the law or custom of bills of exchange there; this was decided on the ground that the witness, from the course of his business had necessarily become acquainted with the Belgian law of bills of exchange. *Vanderdonckt v. Thellusson*, 8 C. B. 812. But a juriconsult, attached to the Prussian consulate, who had no other qualification than having studied law at Leipsig, was held incompetent to prove the stamp law of Cologne on the ground that he had had no practical acquaintance with the law in question. *Bristow v. Sequeville*, 5 Exch. 275. So the evidence of an English lawyer who has studied the foreign law here is not admissible. *In re Bonelli*, 1 P. D. 69. An instrument purporting to be a divorce under the seal of the synagogue at Leghorn, is not admissible without previous proof of the law of the country; *Ganer v. Lanesborough, Ly.*, Peake, 17; but Ld. Kenyon permitted the party divorced to give oral evidence of her divorce at Leghorn, according to the ceremony and custom of the Jews there. *Ibid.* A Roman Catholic vicar-apostolic in England has been admitted to prove the modern marriage law of the church of Rome in Italy. *Sussex Peerage case*, 11 Cl. & F. 114, 117, *et seq.* The competency of the witness to prove foreign law is a question for the court, and the only general rule that can be collected from the reported cases is, that the witness must from his profession or business have had peculiar means of becoming acquainted with that branch of law which he is called to prove; see *Vanderdonckt v. Thellusson*, *supra*. The evidence of a Persian ambassador has been admitted to prove the Persian law of inheritance. *In re Dost Aly*, 6 P. D. 6. And the certificate of a foreign ambassador under the seal of the legation was held sufficient evidence of the law of the country by which he was accredited. *In re Klingemann*, 3 Sw. & T. 18; 32 L. J., P. M. & A. 16.

Now by 24 & 25 Vict. c. 11, the High Court (see J. Act, 1873, s. 16), may remit a case for the opinion of a court in any foreign state with which

her Majesty may have made a convention for that purpose; and by 22 & 23 Vict. c. 63, a case may be stated for the opinion of the superior court of any part of her Majesty's dominions, in order to ascertain the law of that part. A case may be stated thereunder for the opinion of the Court of Session in Scotland. *De Thoren v. Att.-Gen.*, 1 Ap. Ca. 686, D. P.

Proof of Foreign Judgments.

A judgment duly verified by a seal proved to be that of the foreign court was presumed to be regular and agreeable to the foreign law until the contrary is shown. *Alivon v. Furnival*, 1 C. M. & R. 277. And now the stat. 14 & 15 Vict. c. 99, s. 7, cited, *ante*, p. 95, provides for the proof of a foreign or colonial judgment, &c., by means of a copy under the seal of the court, or signed by a judge thereof, with a certificate by him that the court has no seal, and proof of the seal, or signature of the judge is unnecessary. See the cases decided thereon, *ante*, p. 95.

By the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 1, certificates of Irish judgments for the payment of debt, damages, or costs may be registered in the High Court, see J. Act, 1873, s. 16; and the certificate "shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered upon the date of such registration" in the High Court. Sect. 3 makes a similar provision with respect to Scotch decreets.

Proof of Entries in Public Books, Postmarks, &c.

Whenever an original is of a public nature and admissible in evidence as such, an examined copy is, on grounds of public convenience, also admissible. *Lynch v. Clerke*, 3 Salk. 154, *vide ante*, p. 92. Thus examined copies of the entries in the council book; or of a licence preserved in the Secretary of State's office; *Eyre v. Palgrave*, 2 Camp. 606; so of a record deposited in the Land Revenue Office, under 2 Will. 4, c. 1, though it be only a rental of a crown grantee, and not a judicial record; *Doe d. William IV. v. Roberts*, 13 M. & W. 520; of entries in the bank books; *Mortimer v. McCallan*, 6 M. & W. 58; of a bank-note filed at the bank; *Man v. Carey*, 3 Salk. 155; of entries in the books of the East India Company; *R. v. Gordon*, 2 Doug. 593; or in the books of the commissioners of land-tax; *R. v. King*, 2 T. R. 234; or of excise; *Fuller v. Fotch*, Car. 346; or in a poll-book at an election; *Mead v. Robinson*, Willes, 424; *Reed v. Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; or the register of voters; S. C. *Id.*; or an old book kept in the chapter-house of a dean and chapter, purporting to contain copies of leases: *Coombs v. Coether*, M. & M. 398; *Wakeman v. West*, 7 C. & P. 479, are all good evidence of the originals. The rules of savings banks under 26 & 27 Vict. c. 87, may be proved by an examined copy, sect. 4. A copy of an old deed contained in one of the books of the Bodleian Library (which the statutes of the university forbid to be removed) was admitted in evidence under the special circumstances (but query if the original would itself have been admissible? *ante*, p. 97) *Downes v. Mooreman*, Bunb. 189. A collection of treaties, published by the direction of the American government is not sufficient to prove a treaty; an examined (or authenticated) copy should be produced. *Richardson v. Anderson*, 1 Camp. 65, n. Early treaties were enrolled in Chancery; more recent treaties are deposited at the State Paper

Office. As to how examined copies are made, *vide Proof by examined copy, ante*, pp. 92, 93.

The *postmark* on a letter is usually taken as genuine without proof; but, if disputed, it has been doubted whether the person who made it must be called; or whether it may be proved by any postmaster; or by any one in the habit of receiving letters through the same post-office. *Abbey v Lill*, 5 Bing. 299; *Kent v. Lowen*, 1 Camp. 177; *Arcangelo v. Thompson*, 2 Camp. 620; *Fletcher v. Braddlyll*, 3 Stark. 64; *R. v. Plumer*, R. & Ry. 264; *Woodcock v. Houldsworth*, 16 M. & W. 124. Probably it may be verified in any of those ways; and the person who stamped the letter is not likely to recollect that he did so, or to be better qualified to speak of it than any one who happens to be acquainted with the particular post-office mark.

There are various provisions by act of parliament for proving instruments in the custody of registrars of public companies, or other public officers, by certified copies. See *Proof by certified copy, ante*, pp. 93, *et seq.* Of this kind are the registers of joint-stock and banking companies; as to these *vide post*, Part III., *sub tit. Action by and against companies*. Proceedings under Bankruptcy Acts are also facilitated by office copies which prove themselves.

Proof of Entries in Bankers' Books.

The Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), repealing and replacing the Act of 1876 (39 & 40 Vict. c. 48), contains important special provisions relating to the means of proving entries in bankers' books and to their effect in evidence. Its provisions are mainly as follows:—

By sect. 3. "Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded." The expression "legal proceeding" "includes an arbitration;" sect. 10.

Sect. 3 makes copies of entries in bankers' books, evidence of the matters therein recorded even *inter alios*. *Harding v. Williams*, 14 Ch. D. 197.

By sect. 4. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."

By sect. 5. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."

By sect. 9. "In this act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the acts relating to savings banks, and also any post-office savings bank."

"The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting

to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post-office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the Post Office.

"Expressions in this act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank."

By 45 & 46 Vict. c 72, s 11 (2), the expressions "bank" and "bankers" in the above act, "shall include any company carrying on the business of bankers to which the provisions of the Companies Acts, 1862 to 1880, are applicable, and having duly furnished to the registrar of joint stock companies a list and summary with the addition specified by this act, and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint-stock companies."

Proof of Entries in Corporation Books.

The official acts of a municipal corporation, registered in books, may be proved by production of them. *Thetford case*, 12 Vin. Ab. 90. To make the books evidence, it must appear that they come from the proper custody; as from a chest which has always been in the custody of the clerk of the corporation. *Ibid.*; *Shrewsbury, Mercers of, v. Hart*, 1 C. & P. 114. When the entries in the books are admissible as being of a public nature, examined copies are evidence. *Brocas v. London, Mayor of*, 1 Stra. 307. And where, in order to prove the defendant a freeman, a copy upon stamped paper, was produced of a loose paper upon a file, which the witness said was also on a stamp, and was kept with other similar stamped entries on a file among the corporation papers, and it appeared that there was also a book in which the acts of the corporation were kept, and wherein there was an entry more at large of the freeman's admission made when he was originally admitted, but there was no stamp in the book; it was held that the loose paper being the only effectual act, as having the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of that was good evidence. *Per Noel, J., R. v. Head*, Peake Ev. 92, n. This case seems to turn on the necessity of a stamp. Entries of a private nature, which do not relate to corporate acts, must, if admissible, be produced; and copies of them are not evidence, though long kept among the corporate muniments. *R. v. Gwyn*, 1 Stra. 401. An erasure in the entry in the minute book of a corporation must be presumed to have been made before the entry was signed. *Stevens Hospital v. Dyer*, 15 Ir. Ch. R. 405. Where entries made in the books of a college were usually attested by the registrar who was a notary public, and signed by him as such; entries not so attested were held inadmissible as evidence of reputation. *Fox v. Bearblock*, 17 Ch. D. 429.

Proof of Registers of Births, Baptisms, Marriages, &c.

Parish registers of baptisms, marriages, and burials may be proved by production of the register itself, or by examined copies. B. N. P. 247. If a copy be produced, it should be shown that the original was in its proper custody; this is regulated by 52 Geo. 3, c. 146, s. 5, *post*, p. 118; it is not sufficient to show that the register was in the custody of the parish clerk. *Doe d. Ld. Arundel v. Fowler*, 14 Q. B. 700. In order to prove the register

of a marriage it is not necessary to call the attesting witnesses; but, as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, or others present; or the handwriting of the parties may be proved. *Birt v. Barlow*, 1 Doug. 172. But whatever is sufficient to satisfy the jury as to the identity is good evidence; *Ibid.*; *Hubbard v. Lees*, L. R., 1 Ex. 255; and it seems from the last case that the mere similarity of names is sufficient evidence for the jury, and where the jury are satisfied as to the identity the court will not interfere; see also *La Cloche v. La Cloche*, L. R. 4 P. C. 325, 333, and *R. v. Weaver*, L. R. 2 C. C. 85. To prove the handwriting of the parties in the register it is not necessary to produce the original register for that purpose, but the witness may speak to the handwriting in it without producing it. *Sayer v. Glossop*, 2 Exch. 409. A photographic likeness may often be used for the purpose of identification; this is constantly done in actions for divorce, and has been even allowed in a criminal trial. Where a woman was tried for bigamy, a photograph of her first husband was allowed by Willes, J., to be shown to witnesses present at the first marriage, in order to prove his identity with the person mentioned in the certificate of that marriage. *R. v. Tolson*, 4 F. & F. 103. If a marriage is proved by a person who was present, it is not necessary to prove the registration, or licence, or banns. *Allison's case*, R. & Ry., 109. The register is admissible evidence, although it be shown that the incumbent was accustomed to cause the entries to be made from the information of others, and not from personal knowledge. *Doe d. France v. Andrews*, 15 Q. B. 756.

The act still in force for the registration of baptisms and burials by clergy of the Church of England is 52 Geo. 3, c. 146. It directs that the parish register shall be kept by the clergyman, either at his residence, or in the church (sect. 5), and provides that verified copies shall be annually sent to the registrar of the diocese (sect. 7). It seems that the latter, being public documents, are evidence as well as the former, and may be proved by examined copies; *Walker v. Beauchamp*, 6 C. & P. 552, per Alderson, B.; and see *Att.-Gen. v. Oldham*, cited in Burn on Parish Registers, 209. But *quære* whether the bishop's transcripts, made before that act, can be used, except as secondary evidence? See *Walker v. Beauchamp*, *supra*.

The registration of marriages by clergy of the Church of England is now regulated by 6 & 7 Will. 4, c. 86. By sect. 31 and schedule, the minister, after solemnising a marriage, is to register, in two register books, in the form prescribed by the Act, the date, names, age, condition, and rank of the parties, their residence at the time of the marriage, and the names and rank of their fathers; and the entries are to be signed by the minister, the parties married, and two witnesses; by sect. 33, one of these books, when filled, is to be sent to the superintendent registrar, and the other to be kept by the minister with the registers of baptisms and burials. As to proof of these registers by copies, *vide post*, p. 119.

By 27 & 28 Vict. c. 97, all burials in any burial ground in England are to be registered. By sect. 5 these registers and copies thereof may be used in evidence of the burials entered therein.

A burial under the Burial Laws Amendment Act, 1880, 43 & 44 Vict. c. 41, is by sect. 10 to be certified by the person in charge thereof, to the person who is bound to keep the register, and the latter is to enter the burial therein.

By 3 & 4 Vict. c. 92, certain non-parochial registers of births, baptisms, deaths, burials, and marriages, transferred to the custody of the Registrar-General, are made admissible in evidence, either by producing them, or by certified extracts from them, after previous notice to the opposite party of

the intention to use them. And by 21 & 22 Vict. c. 25, numerous other non-parochial registers and records of births, deaths, baptisms, burials, and marriages have been since certified to be faithful, and deposited with the registrar-general, and have become admissible in evidence.

By 42 & 43 Vict. c. 8, s. 3, where by lawful authority documents such as registers, muster-rolls, and pay lists have been kept, showing deaths, births, and marriages among officers and soldiers, and these or certified extracts thereof have been transmitted to the Registrar-General, they and certified copies thereof shall be admissible in evidence; but (sects. 4, 5), in respect of births, deaths, and marriages in the United Kingdom, only in respect of those which occurred prior to 1st July, 1879.

The general registration of births, marriages, and deaths is regulated by the 6 & 7 Will. 4, c. 86, explained and amended by the 1 Vict. c. 22. By these acts district registrars are appointed, whose duties are independent of those belonging to the parochial clergy. Regulations are made for the custody of the register books, and the registrars are directed to learn and register the particulars required to be registered according to the forms in the schedules to the first act. These particulars comprise in the case of births, the time of birth, name (if any), and sex, the names of the parents, and the condition of the father, and in the case of deaths, the age, sex, and condition of the deceased; and by 1 Vict. c. 22, the Registrar-General may direct the *place* of birth or death to be added to the register of those facts, and the addition, when so made, shall be taken, to all intents, to be part of the entry in the register.

The stat. 6 & 7 Will. 4, c. 86, as above stated, regulates the registration of marriages by clergymen of the Church of England, and it also regulates those by Quakers and Jews. For the particulars required to be registered, *vide ante*, p. 118.

The Act 6 & 7 Will. 4, c. 85, for amending the law of marriage, provides for the registration of marriages *solemnised under that Act*, and is also incorporated with the above Act, c. 86, and it, by sect. 44, enacts that the provisions of the Act, c. 86, *supra*, relating to the register of marriages, or certified copies thereof, shall extend to marriages under the Act, c. 85.

By 6 & 7 Will. 4, c. 86, s. 38, it is provided that certified copies of entries, purporting to be sealed with the seal of the registrar-general's office, shall be "evidence of the *birth, death, or marriage* to which the same relates without any further or other proof of such entry, and no certified copy purporting to be given in the said office, shall be of any force or effect, which is not sealed or stamped as aforesaid." The identity of the party must of course be proved. *Parkinson v. Francis*, 15 Sim. 160. As to this *vide ante*, p. 118. By sect. 35 the registrars, as also all rectors, curates, &c., are bound to give certified copies; it is not expressly provided that these latter certificates shall be evidence without further verification. It has, however, been held that under 14 & 15 Vict. c. 99, s. 14, cited *ante*, p. 96, certified copies of parish registers, purporting to be signed by A. B., "incumbent," or "rector," or "vicar," or "curate," without specifying the parish over against the name, or adding "of the above parish," are admissible without verification; for it will be intended that the incumbent, &c., is incumbent of the parish named in the certificate, and is the officer intrusted with the custody of the original register. *Re Hall's Estate*, 22 L. J., Ch. 177, L.J.J. So, a certificate purporting to be signed by the registrar having the custody of the original register is admissible on its mere production. *R. v. Weaver*, L. R. 2 C. C. 85.

As these acts require a fuller statement to be entered in the registers than before, the question arises how far the register is evidence of all the

facts stated in it; as to the time and place of birth, age, description, &c. It should seem, however, that such particulars being supplied by private persons only, and not being within the knowledge of the registering officer, are not admissible as evidence of them against third persons, merely because they are officially entered on the register; *Semb. per cur. Huntley v. Donovan*, 15 Q. B. 96. And accordingly such certificate of birth is evidence of the fact, but not of the date of birth. *Re Wintle*, L. R., 9 Eq. 373. M. R. The judgment in *R. v. Weaver*, *ante*, p. 119, proceeds on a contrary assumption, but the point does not appear to have been noticed.

The Births and Deaths Registration Act 1874 (37 & 38 Vict. c. 88), which is (by sect. 52) to be read with the earlier acts relating thereto, contains (sect. 38) restrictions on the admissibility of these registers of births and deaths in evidence, but the provisions are of too minute a character to be further noticed here. It would seem from this section that the entries of other registrars besides the Registrar-General may be evidence under certain limitations. Thus the district registrar's certificate is evidence of death. See *Traill v. Kibblewhite*, 10 Jur. 107, Shadwell, V. C., 1847.

The registration of a building under 6 & 7 Will. 4, c. 85, for the solemnisation of marriages under that Act, may be proved either by a certified copy under 14 & 15 Vict. c. 99, s. 14, *ante*, p. 96, or by an examined copy of the register. *R. v. Manwaring*, 1 Dears. & B. 132; 26 L. J., M. C. 10. By stat. 19 & 20 Vict. c. 119, s. 24, every certified copy or extract sealed or stamped with the seal of the General Register Office, shall be received as evidence of the place of meeting therein mentioned having been, at the time therein stated, duly certified and registered or recorded as by law required, without any further or other proof of the same.

Marriages in Scotland and Ireland.] The Act 19 & 20 Vict. c. 96, s. 1, invalidates every irregular marriage in Scotland contracted after 31st December, 1856, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage. By sect. 2, the registrar of the parish or burgh in which an irregular marriage has been contracted after the said day, is, upon receiving a certain warrant from the sheriff or sheriff-substitute, granted on the joint petition of the parties, to enter the marriage in a register, and a certified copy of such entry signed by the registrar is to be received in evidence of such marriage, and of such residence or of such previous living 21 days in Scotland, in all courts in the United Kingdom and dominions thereunto belonging.

The Irish Marriage Act, 7 & 8 Vict. c. 81, amended by and incorporated with 26 & 27 Vict. c. 27; 33 & 34 Vict. c. 110, Part II.; and 36 & 37 Vict. c. 16, provides for the registration of all marriages in Ireland. By 7 & 8 Vict. c. 81, s. 71, certified copies of entries are given at the register office in Dublin, and these if purporting to be sealed or stamped with the seal of the office, are made evidence of the marriage to which they relate without any further proof of such entry or of the seal.

Births, deaths, and marriages in India and the Colonies.] Books kept among the archives of the East India Company before the transfer of their supreme powers to the crown, being copies of marriage registers kept at each presidency, and transmitted officially to the company, are evidence of marriages in India, when produced from the proper custody. *Ratcliff v. Ratcliff*, 1 Sw. & Tr. 467; 29 L. J., P. M. & A. 171. So similar copies of registers of baptism in India are admissible in evidence. *Queen's Proctor v.*

Fry, 4 P. D. 230. These registers are deposited at the offices of the Secretary of State for India.

By the 14 & 15 Vict. c. 40, s. 11, provision was made for the registration of the marriages of persons professing the Christian religion in India, solemnised under that act before a registrar, and, by sect. 12, duplicates of the register were directed to be transmitted to the secretary to the government in the presidency or place, or place of residence of the registrar, to be kept by him; and in certain instances these duplicates were to be transmitted to the Registrar-General of births, &c., in England. Sect. 21 enacted, that the act was not to affect marriages solemnised in India by persons in holy orders, nor Scotch marriages there legalised by stat. 58 Geo. 3, c. 84, nor other legal marriages there; and the Governor-General was empowered to make laws for the registration of such marriages; and to provide for the transmission of duplicates to the Registrar-General of births, &c., in England. Sect. 22 provided that certified copies of the certificates delivered under this act to the Registrar-General, purporting to be sealed or stamped with the seal of the General Register Office, should be received as evidence of the marriage to which they relate, without further proof of such certificate, or of any entry therein. This act was repealed by the Stat. Law Rev. Act, 1875, with the proviso that such repeal shall not affect "the proof of any past act or thing." These marriages are now regulated by Indian Acts.

By stat. 42 & 43 Vict. c. 8, registers kept under Queen's regulations of births, deaths, and marriages occurring out of the United Kingdom, among British officers and soldiers, are to be transmitted to the Registrar-General, and filed or copied in the "Army Register Books," which is to be deemed a certified copy of the register book within the meaning of the Registration Acts.

In Australia, Canada, Nova Scotia, the West Indies, and other of the British colonies, acts of parliament are in force for the registration of births, marriages, and deaths, and where such is the case the registers may be used in evidence.

Births, deaths, and marriages at sea.] By 17 & 18 Vict. c. 104, s. 282, the masters of ships for which official log-books were required were to enter therein births, marriages and deaths taking place on board, and, by sect. 285, these entries are to be received in evidence in any proceeding in any court of justice, saving all just exceptions; *vide post*, pp. 122, 123. The Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), by sect. 54, repeals 17 & 18 Vict. c. 104, s. 282, so far as relates to entries to births and deaths, and by sect. 37, provides for the record of births and deaths happening on board ship. A return is to be made of such record to the Registrar-General of Shipping and Seamen, who (sub-sect. 5) is to send a certified copy of such return to the Registrar-General of Births and Deaths. By sub-sect. 7, the copy is to be filed or copied in "a marine Register-book," which is to be deemed to be a certified copy of a register-book within the meaning of the Registration Acts.

Births, deaths, and marriages abroad.] Foreign registers of births, marriages, and deaths would seem to be admissible, if proved to have been prepared under official authority. In *Abbott v. Abbott*, 29 L. J. P. M. & A. 57, a certificate copied from a register made by the *curé* of a parish in Chili, under public authority, was received. In this case the certificate was signed by the *curé*, whose signature and character were verified by the certificate of a notary public, whose character was further certified by the certificate of three other notaries public, their character being in turn verified

by the Minister for Foreign Affairs for Chili, and this again by the British consul there. Registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, are now placed in the registry of the Consistory Court of London. By 12 & 13 Vict. c. 68, British consuls authorised to act for this country abroad may be empowered by a Secretary of State to grant licences for, and to solemnize marriages where both or one of the parties are British subjects; and by sects. 11, 12, they are directed to make entries of these marriages in a register book, copies of which are to be forwarded to the Secretary of State, and by him transmitted to the Registrar-General. Sect. 18 provides, that this Act shall be taken as part of the Act 6 & 7 Will. 4, c. 86, *ante*, pp. 118, 119, and that every consul shall be deemed a registrar under that Act, and the provisions of that Act shall relate to consuls and the registers of marriages under this Act and certified copies thereof.

By the Consular Marriages Act, 1868 (31 & 32 Vict. c. 61), s. 3, every person acting or legally authorized to act in the place of a British consul, duly authorized to solemnize marriages, shall be deemed a British consul duly authorized for all the purposes of the Act, 12 & 13 Vict. c. 68, *supra*.

Proof of Merchant Shipping Documents.

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), various provisions are made for the easier proof of documents relating to such shipping. Thus all documents purporting to be issued or written by direction of the Board of Trade, and to be sealed with the seal of the Board or signed by one of the secretaries or assistant secretaries of such Board, shall be received in evidence and deemed to be so issued or written without further proof, unless the contrary be shown. Sect. 7.

The Board issues forms of books, instruments, and papers required by the Act and sealed with its seal; and none "unless made in such form shall be admissible in evidence in any civil proceeding on the part of any owner or master of any ship." A form purporting to have been so issued, and bearing the seal is to be taken *prima facie* as in the form required. Sect. 8.

Every register or declaration made in pursuance of Part II. of the Act, in respect of a British ship, may be proved either by production of the original, or by an examined copy, or by a copy purporting to be certified under the hand of the registrar or person in charge of the original; and every such register or copy, and every certificate of registry of a British ship, purporting to be signed by the registrar or proper officer, shall be received in evidence, as *prima facie* proof of all the matters contained or recited in the register, when the register or copy is produced, and of all matters contained in or endorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced. Sect. 107. The several particulars to be declared, registered, or certified, are fully specified in the Act.

Sect. 280 requires official log-books to be kept in a prescribed form, containing certain entries, and by sect. 285 all entries so made in such logs, shall be received in evidence in any court subject to all just exceptions. See *The Henry Coxon*, 3 P. D. 156, cited *ante*, p. 59. The entry therein of births, marriages, and deaths, was provided for by sect. 282, but births and deaths are now registered under 37 & 38 Vict. c. 88, s. 37, *vide ante*, p. 121.

The saving in sects. 282, 285, leaves open the question of the admissi-

bility of such entries as evidence of the fact entered. It would seem too that the book must be proved to be the official log-book so kept under the Act.

Sect. 107 of 17 & 18 Vict. c. 104, *ante*, p. 122, corresponded almost *verbatim* with the provisions of sect. 12, of Lord Brougham's Evidence Act (14 & 15 Vict. c. 99), *vide ante*, pp. 95, *et seq.*; this latter section was repealed by the Stat. Law Rev. Act, 1875.

By the Merchant Shipping Act Amendment Act, 1855 (18 & 19 Vict. c. 91), s. 15, the copy or transcript of the register kept by the chief registrar in London, or by the Registrar-General of Shipping and (see 35 & 36 Vict. c. 73, s. 4) Seamen, is to "have the same effect to all intents and purposes as the original register."

In *R. v. Castro*, Q. B. trial at bar, 28 Nov. 1873, *ex relatione editoris*, crew lists of vessels which had cleared from the custom-house at New York were allowed to be proved by examined copies, without accounting for the non-production of the originals, *vide ante*, p. 98.

Proof of Corporation Deeds.

Fixing the common seal is tantamount to delivery. Com. Dig. Fait (A. 3). The seal must be proved by some one who knows it, but it is not necessary to call a witness who saw it affixed. *Moises v. Thornton*, 8 T. R. 307; *Brounker v. Atkyns*, Skinn. 2. Some corporation seals, as that of London, require no proof. *Doe d. Woodmass v. Mason*, 1 Esp. 53. Not so the seal of the Bank of England; *Semb. Doe d. Bank of England v. Chambers*, 4 Ad. & E. 410; nor the seal of any other corporation, unless it be made to prove itself by some statute, or be made admissible by the Act 8 & 9 Vict. c. 113, s. 1, *ante*, p. 94.

If the seal of a corporation is attached to an instrument, it will be presumed, as against them, to have been regularly attached, and it lies on them to give strict proof to the contrary, so as to exclude such presumption. *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 315. The presumption may, however, be rebutted by evidence. *Anon.*, 12 Mod. 423. The irregularity, when a defence might formerly have been shown under *non est factum*; *Hill v. Manchester Waterworks Co.*, 5 B. & Ad. 866; *R. British Bank v. Turquand*, 5 E. & B. 256; *D'Arcy v. Tamar, &c., Ry. Co.*, L. R., 2 Ex. 158. But it would now seem necessary to plead it specially, as the objection would be likely to take the plaintiff by surprise. See Rules 1883, O. xix., r. 15, *ante*, p. 72. A person who manages the affairs of a trading corporation must of necessity have power to use the corporate seal for those acts he is authorized to perform. *Ex pte. Contract Corporation*, L. R., 3 Ch. 105, 116. As to the power of *de facto* directors to bind their company, see *In re County Life Assurance Co.*, L. R., 5 Ch. 288. It is not settled whether such a deed proves itself after thirty years. *R. v. Bathwick*, 2 B. & Ad. 639. Lapse of time does not increase the difficulty of proving a corporation seal, which is one, but not the only, reason for dispensing with proof.

As to proof where the deed is attested, *vide post*, p. 124; and as to what constitutes attestation, *vide post*, p. 126. The name of a corporation as stated in a deed must be the same in substance with the true name, but need not be the same in words or syllables. *R. v. Haughley*, 4 B. & Ad. 650, citing *Lynn's (Mayor of) Case*, 10 Rep. 124; *Croydon Hospital v. Farley*, 6 Taunt. 467. And where a municipal corporation who, under 21 & 22 Vict. c. 98, s. 24, were also the local board of health, entered into a contract under seal as such local board, the corporation were held to be bound; *Andrews v. Ryde, Mayor, &c., of*, L. R., 9 Ex. 302.

Where a question arises as to the effect of two deeds relating to the same subject-matter, both executed on the same day, it must be proved which was in fact executed first; but if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, then the Court will presume that the deeds were executed in such order as to give effect to that intention. *Gartside v. Silkstone & Dodworth Coal & Iron Co.*, 21 Ch. D. 761.

Proof of Private Deeds and Writings.

Attesting witness, when to be called.] It was long a settled rule that wherever a deed or other instrument is subscribed by attesting witnesses, one of them at least must be called to prove the execution; and it was held that such testimony could not be dispensed with, though the defendant had admitted the execution in his answer to a bill in Chancery. *Call v. Dunning*, 4 East, 53. Thus a notice to quit (*Doe d. Sykes v. Durnford*, 2 M. & S. 62) or a warrant to distrain (*Higgs v. Dixon*, 2 Stark. 180), if attested, could only be proved by calling the attesting witnesses. This rule was considered of indispensable obligation, and to be "so inflexible, clear, and universal, as not to be set aside by any reasoning, however cogent." Hence, although *Slatterie v. Pooley*, 6 M. & W. 664, had decided that an admission by a party was primary evidence against him of any document and its contents, and although the stat. 14 & 15 Vict. c. 99, s. 2, had provided that parties to a suit were competent and compellable to give evidence in it, yet it was ruled in *Whyman v. Garth* (8 Exch. 803; 22 L. J., Ex. 316), that the plaintiff can neither prove the execution of an attested deed by the testimony in open court of the defendant who executed it, nor examine such defendant as to the contents of it. The law has now been partially amended by the C. L. P. Act, 1854, s. 26, which enacts, that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." But as there are many instruments to which attestation is essential, as wills, instruments under powers, bills of sale, &c., it is still necessary to retain many of the old decisions on the subject, although even in these cases the necessity for calling the attesting witnesses only arises where it is necessary to prove the instrument, for the parties against whom any of these instruments requiring attestation are sought to be used may waive the necessity for calling the attesting witness by admissions. Thus, if in the course of the proceedings in the cause, the party voluntarily admits the execution, or if by his pleadings he does not require the execution to be proved, there is no necessity for calling the attesting witness. But where proof has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, and against whom it is sought to be used, into the witness-box, and extracting an admission of the execution from him; *Whyman v. Garth*, *supra*.

Where the attesting witness is dead (*Anon.*, 12 Mod. 607), or insane (*Currie v. Child*, 3 Camp. 283), or infamous (*Jones v. Mason*, 2 Stra. 833), or absent in a foreign country, or not amenable to the process of the superior courts (*Prince v. Blackburn*, 2 East, 252), although he might have been examined on interrogatories (*Glubb v. Edwards*, 2 M. & Rob. 300), or where he cannot be found after diligent inquiry (*Spooner v. Payne*, 4 C. B. 328; *Cunliffe v. Sefton*, 2 East, 183);—evidence of the witness's handwriting has always been admissible. A subscribing witness, who has become blind,

ought nevertheless to be called in order to learn from him anything material that passed at the execution. *Crank v. Frith*, 2 M. & Rob. 262, per Lord Abinger, C. B. *Accord. Rees v. Williams*, 1 De G. & Sm. 314. In *Pedler v. Paige*, 1 M. & Rob. 258, Park, J., admitted proof of the handwriting of a blind witness (but with some expression of doubt), on the authority of *Wood v. Drury*, 1 Ld. Raym. 734; but that case is obscurely reported, and if it be an authority for the proposition, it also shows that it would be sufficient to prove his handwriting, though there be another attesting witness who might have been called, which is not the present practice; *vide post*, p. 126. It is not sufficient ground for admitting evidence of the witness's handwriting that he is unable to attend from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 Camp. 457. The party interested in his testimony must, in such a case, get a judge's order to examine him out of court.

With regard to the inquiry necessary to let in such evidence, it has been held that an inquiry after an attesting witness to a bond at the residence of the obligor and obligee is sufficient. *Cunliffe v. Sefton*, ante, p. 124. So, diligent inquiry at the witness's usual place of residence, and information there and from the witness's father that he had absconded to avoid his creditors. *Crosby v. Percy*, 1 Taunt. 364; *Accord. Falmouth, El. of, v. Roberts*, 9 M. & W. 469. So, inquiry after the witness at the Admiralty, where it appeared by the last report that he was serving on board a ship in the navy; *Parker v. Hoskins*, 2 Taunt. 223; or proof that the witness went abroad 20 years ago, and has not been heard of since. *Doe d. Johnson v. Johnson*, 1 Phill. Ev. 474, n. A witness who was defendant's clerk, being subpoenaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at the defendant's house, and in the neighbourhood, and upon information at the defendant's that the witness was gone to Margate, inquiry was made there without success: held that, under these circumstances, evidence of his handwriting was admissible. *Burt v. Walker*, 4 B. & A. 697; *Spooner v. Payne*, ante, p. 124. Where diligent inquiry had been made without success for a witness, proof of his handwriting was admitted, although it appeared that a letter from him, concealing his retreat, had been received before the trial. *Morgan v. Morgan*, 9 Bing. 359. So, where an attorney's clerk was witness, and the attorney could give no account of him; although afterwards at the trial he recollected where he might perhaps be heard of. *Miller v. Miller*, 2 N. C. 76.

The sufficiency of the inquiry is for the determination of the judge, who will found his opinion on the nature and circumstances of each case. It therefore seems of little importance to collect all the cases that have been decided upon this point. When the court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting without proving the handwriting of the party, unless with a view to establish his identity. *Nelson v. Whittall*, 1 B. & A. 19; *Gough v. Cecil*, C. B., T. T. 24 Geo. 3; M. S., cited, Selw. N. P., 13th ed. 494.

Where the name of a fictitious person is inserted as witness; *Fasset v. Brown*, Peake, 23; or where the subscribing witness denies any knowledge of the execution; *Talbot v. Hodson*, 7 Taunt. 251 (overruling *Phipps v. Parker*, 1 Camp. 412); *Fitzgerald v. Elsee*, 2 Camp. 635; *Boxer v. Rabeth*, Gow, 175; or gives evidence that the document was not duly executed; *Bowman v. Hodgson*, L. R., 1 P. & M. 362; or where the attesting witness subscribes his name without the knowledge or consent of the parties; *M'Craw v. Gentry*, 3 Camp. 232;—in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting

of the person executing it, or who was present at the time of execution ; or by the admission of the party.

Where there are two attesting witnesses, and one of them is incompetent or his evidence cannot be obtained, the other witness must be called ; and evidence of the handwriting of the absent witness will not be sufficient. *Adm. in Cunliffe v. Sefton*, 2 East, 183. But where a bond is attested by two witnesses, and one of them is dead, and the other beyond the reach of the process of the court, proof of the handwriting of either seems to be sufficient ; *Adam v. Kerr*, 1 B. & P. 360.

It will not be assumed that a name subscribed to an instrument is necessarily that of an attesting witness ; thus where a deed purported to be "sealed by order of the Governor and Company of the Bank, J. Knight, Secretary." It was held unnecessary to call J. Knight ; *Doe d. Bank of England v. Chambers*, 4 Ad. & E. 410 ; and where the seal of a company was affixed to a deed, and two directors signed their names in the following form :—"Seal of the said Company affixed at the board meeting this [date], in the presence of O., *Chairman*, C., *Director*. (Countersigned) D., *Sec. pro tem.*"—It was held that the signatures of O. and C. formed part of the execution of the deed, and that they were not attesting witnesses ; *Deffell v. White*, L. R., 2 C. P. 144 ; following *Shears v. Jacob*, L. R., 1 C. P. 513 ; see also *Dunn v. Dunn*, L. R., 1 P. & M. 277. The attorney who attested the petition of an insolvent under 5 & 6 Vict. c. 116, was held not such a witness as need be called to prove it. *Bailey v. Bidwell*, 13 M. & W. 73. But this decision has been considered to proceed on the ground that the petition had been acted upon by the court below and authenticated by its seal, and was put in only to prove the fact of a petition presented ; and where the schedule of the insolvent is used to show an admission by him, the attorney who attested the insolvent's signature must be called. *Streeter v. Bartlett*, 5 C. B. 562. In *Bailey v. Bidwell*, *supra*, it was considered that where a mere rule of practice of the court required an attesting witness, he need not be called. *Streeter v. Bartlett*, *supra*, is *contra* on this point. It will therefore still be a question whether, in such a case, the C. L. P. Act, 1854, s. 26 (*ante*, p. 124), dispenses with calling the attesting witness. Non-compliance with the rule may make the instrument irregular without making it "invalid." The witness must still be called if attestation is requisite to its "validity."

Where an attested agreement was indorsed with subsequent variations, and the plaintiff sued on it as altered, it was held enough to prove the execution of the indorsement, for it formed a new agreement incorporating the old one and dispensing with the necessity of any other proof of it. *Fishmongers' Co. v. Dimsdale*, 6 C. B. 896 ; 12 C. B. 557 ; 22 L. J., C. P. 44 ; Ex. Ch.

Execution, how proved.] Where attestation is necessary to the validity of a writing, the form and nature of it must depend on the provision of the law or other authority which has made it necessary. Unless it be otherwise provided, in attesting a deed, it is not necessary that the witness should see the party sign or seal ; if he sees him deliver it already signed and sealed, or sealed only where signature is unnecessary, it will be sufficient. Thus proof by the witness that he was not present when the deed was executed, but was afterwards requested by one of several parties to sign the attestation, is sufficient evidence of the execution by such party ; *Grellier v. Neale*, Peake, 146 ; and witnesses may be called to prove the handwriting of the remaining parties, as to whom the deed must be considered as unattested ; and sealing and delivery may be presumed. *Ibid.* It is not necessary for

the attesting witness to be able to say whether certain blanks in the deed were filled up at the time of execution, for this will be presumed; and the witness generally sees nothing but the delivery. *England v. Roper*, 1 Stark. 304. See *Doe d. Tatum v. Catomore*, 16 Q. B. 745; 20 L. J., Q. B. 364. Where a bond was executed by the defendant, and attested by a witness in one room and was then taken in an adjoining room and at the request of the defendant's attorney, and in the defendant's hearing, was attested by another witness who knew the defendant's handwriting, it was held that the execution might be proved by the latter witness, the whole being considered as one transaction. *Parke v. Mears*, 2 B. & P. 217; and see *Anon.*, Arch. Pl. & Ev., 1st ed. 378. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution. *Per Bayley, J., Maugham v. Hubbard*, 8 B. & C. 16; *per Taunton, J., R. v. S. Martin's, Leicester*, 2 Ad. & E. 213. As to the priority of two deeds executed on the same day, *vide ante*, p. 124. The grantee under a deed is not competent to attest the execution thereof by the grantor. *Seal v. Claridge*, 7 Q. B. D. 517 C. A.

Identity of person signing, &c.] Some evidence of the identity of the party to the instrument must be given, though very slight evidence will be sufficient. Where the proof of the acceptance of a bill was simply the handwriting of the attesting witness on an acceptance, some evidence of the identity of the defendant and the person whose acceptance is thus proved, was held necessary; *Whitelocke v. Musgrove*, 1 Cr. & M. 511; and it has been thought not sufficient merely to prove that a person calling himself by the same name (which was common in the neighbourhood where the witness saw the signature put), accepted the bill; *Jones v. Jones*, 9 M. & W. 75. Where the witness to a bond stated that he saw it executed by a person who was introduced under the name of *Hawkshaw* (the name of the defendant), but could not identify him, the plaintiff was non-suited. *Parkins v. Hawkshaw*, 2 Stark. 239; *Middleton v. Sandford*, 4 Camp. 34. But where the attestation states the residence of the party, proof that the party sued resided there would be *prima facie* evidence of identity. See *Whitelocke v. Musgrove*, and *Jones v. Jones*, *supra*; *per cur.* Thus where the acceptor was described as "C. B. Crawford, East India House," proof that the signature was that of a person of the same name, a clerk of the East India House, was held to be *prima facie* evidence of identity; *Greenshields v. Crawford*, 9 M. & W. 314; and in *Roden v. Ryde*, and *Sevell v. Evans*, 4 Q. B. 626, it was held that, unless the name is so common as to neutralize the inference of identity, or other facts appear to raise a doubt, identity of name is *prima facie* enough to charge the defendant. *Accord. Hamber v. Roberts*, 7 C. B. 861. See further, *Birt v. Barlow*, and *Hubbard v. Lees*, cited, *ante*, p. 118. That the defendant had spoken of the contents of the deed is evidence of identity. *Doe d. Wheeldon v. Paul*, 3 C. & P. 613. Where a note was made payable to J. H. and indorsed by a person so named, and there were two persons, father and son, named J. H., it will be presumed that the son was the payee, if the son indorsed it; *Stebbing v. Spicer*, 8 C. B. 827. In an action by an indorsee against the acceptor of a bill, whereof S. was the payee, the plaintiff proved that a person calling himself S. came to the plaintiff's residence with the bill in question and a letter of introduction, proved to be genuine, which was expressed to be given to a person introduced to the writer as S., and also another bill drawn by the writer of that letter. The bearer of these documents, after remaining some days at the plaintiff's residence, indorsed to him the bill in question. This was

held to be *prima facie* evidence of the identity of this person with S.; *Bulkeley v. Butler*, 2 B. & C. 434.

Sealing and Delivery.] The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledges an impression already made. Where one partner in the presence of his co-partner executed a deed for both, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held sufficient; for that no particular mode of delivery was requisite, and it was enough if a party executing a deed treated it as his own. *Ball v. Dunsterville*, 4 T. R. 313. But where a deed is executed under the authority of a power requiring it to be under the *hands and seals* of the parties, the parties must use separate seals. Thus, by stat. 8 & 9 Will. 3, c. 30, certificates were required to be under the hands and seals of the overseers and churchwardens; it was held that a certificate signed by two churchwardens and one overseer, but bearing two seals only, was not a valid certificate. *R. v. Austrey*, 6 M. & S. 319. The circumstance of a party writing his name opposite to the seal on an instrument which purports to be sealed and delivered by him, is evidence of a sealing and delivery to go to a jury. *Talbot v. Hodson*, 7 Taunt. 251. So, where the defendant delivers to the plaintiff a deed signed and sealed and expressed to be signed, sealed, and delivered, it will be taken as against the defendant that it has been also delivered. *Xenos v. Wickham*, L. R., 2 H. L. 296. Where a party executes a deed with a blank in it, which is afterwards filled up with his assent in his presence, and he subsequently recognises the deed as valid, the filling up of the blank will not void it; for, till the blank is duly supplied, it is incomplete and *in fieri*. *Hudson v. Revett*, 5 Bing. 368; *Hall v. Chandless*, 4 Bing. 123. But generally a deed executed in blank and left to be filled by another, who has no authority under seal, is void; *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Taylor v. Gt. Indian Peninsular Ry. Co.*, 4 De G. & J. 559; 28 L. J., Ch. 709; and *Tezira v. Evans*, 1 Anstr. 228, *contra*, is not law. While the deed is still in the hands of the party executing it, another name may be inserted, and it may be re-executed, without avoiding it as to the first parties, or requiring a new stamp. *Spicer v. Burgess*, 1 C. M. & R. 129; *Jones v. Jones*, 1 Cr. & M. 721. A deed was executed by a son of the defendant T. F., thus: "J.W.F. for T. F.;" and the defendant, when subsequently shown the deed so executed, said his son had authority to execute it for him, and that he adopted his son's act; this was held to be a re-delivery by the defendant. *Tupper v. Foulkes*, 9 C. B., N. S. 797; 30 L. J., C. P. 214. As to a deed being binding on an agent who executed it as such, as well as on his principal, see *Young v. Schuler*, 11 Q. B. D. 651, C. A., cited *ante*, p. 17.

When a subscribing witness is dead, proof of the handwriting of such witness is evidence of everything on the face of the paper which imports to be sealed by the party. *Per Buller, J., Adam v. Kerr*, 1 B. & P. 361. And where the "signing and sealing" are alone noticed in the attestation, yet this is evidence of the delivery also. *Semb. Hall v. Bainbridge*, 12 Q. B. 699. Where the party named has acted under the deed, it will be presumed as against him to have been executed by him, although the seal has no signature annexed, nor any attestation; *Cherry v. Heming*, 4 Exch. 631; for signature is not necessary to the execution of a deed, unless it be under a power which requires it; and it also seems that neither wax nor wafer are necessary, and that if a *stamped* impression be made on the paper in place of a seal as commonly used, it is a sufficient *sealing*, even under a power which requires a seal. *Sprange v. Barnard*, 2 Bro. C. C. 585. And it has been held that "to constitute a sealing neither wax nor wafer, nor a piece of paper, nor even an impression is necessary." *In re Sandlands*, L. R. 6 C. P. 411. See also Sugden on Powers, 8th ed. 232.

In the delivery of a deed no particular form is necessary. Throwing it upon a table with the intent that the other party shall take it up, is sufficient. Com. Dig., Fait (A. 3). Where a deed is delivered by virtue of a power of attorney, the power should be produced; *Johnson v. Mason*, 1 Esp. 89; and proved; 1 Phill. Ev. 505, 4th ed. In some instances a general agent has been presumed to have such authority. *Doe d. Macleod v. E. London Waterworks*, M. & D. 149. See *Tupper v. Foulkes*, ante, p. 128. But, in general, the agent must be authorised by deed. *Berkeley v. Hardy*, 8 D. & Ry. 102; *Hibblewhite v. M'Morine*, ante, p. 128. A deed executed by a marksman may be proved by a person who has seen the party make his mark, and can speak as to its peculiarities. *George v. Surrey*, M. & M. 516.

If the deed after sealing be tendered to the covenantee, and he expressly rejects it, and refuses to take any benefit from it, the execution is incomplete. This defence was formerly admissible in evidence under *non est factum*; *Whelpdale's case*, 5 Rep. 119 a; *Xenos v. Wickham*, 13 C. B., N. S. 435; 33 L. J., C. P. 13; Ex. Ch., reversed on another ground; L. R., 2 H. L. 296. It must now, however, be pleaded specially; Rules, 1883, O. xix. r. 15, ante, p. 72.

Signature, whether necessary.—Indenture.] Signature forms no part of the execution of a deed, but as the Stat. of Frauds, by ss. 1, 3, 4, and 17, requires interests in land to be created, surrendered, or assigned by instrument in writing, and certain contracts to be evidenced by writing, *signed*, the question has arisen whether an unsigned deed satisfies this statute or not. The better opinion now is that the statute operates on oral contracts only, and does not affect deeds; Shep. Touchst. by Preston, c. 4, p. 56, (24); *Aveline v. Whisson*, 4 M. & Gr. 801; *Cherry v. Heming*, 4 Exch. 631, and that therefore an unsigned deed will be good notwithstanding the statute. The opinion of Blackstone was the other way. 2 Bl. Com. 307.

By stat. 8 & 9 Vict. c. 106, s. 5, a deed executed after the 1st October, 1845, "purporting to be an indenture, shall have the effect of an indenture, although not actually indented."

Escrow.] A condition previously expressed, though not introduced into the act of delivery, is sufficient to make it a delivery as an escrow. *Per Abbott, C. J., Johnson v. Baker*, 4 B. & A. 441; and see *Murray v. Stair*, El. of, 2 B. & C. 82. Delivery as an escrow requires no express words, but may be inferred from circumstances. *Bowker v. Burdekin*, 11 M. & W. 128. Where a person delivers a deed in the presence of a witness, but retains it in his own possession, there being nothing to show that it was not intended to operate immediately, it will take effect as a deed and not as an escrow; *Doe d. Garmons v. Knight*, 5 B. & C. 671; *Xenos v. Wickham*, L. R., 2 H. L. 296. The delivery of a deed to a third person for the use of the party in whose favour the deed is executed, has the same effect. *Doe d. Garmons v. Knight*, supra. But delivery by the grantor of a grant executed by him, to the solicitor of the grantee, may be shown to have been conditional only. *Watkins v. Nash*, L. R. 20 Eq. 262. In a case where a debtor executed a mortgage to his creditor unknown to the latter, and kept it twelve years in his own custody till he died, the deed was held valid from the date in the absence of evidence to show that it was an escrow. *Exton v. Scott*, 6 Sim. 31. Where A. executes an instrument and delivers it to B. as an escrow to be delivered to C. on a certain event, possession by C. is *prima facie* evidence against A. of the performance of the condition. *Hare v. Horton*, 5 B. & Ad. 715. And delivery to a third person is not essential to a delivery as an escrow. *Gudgen v. Besset*, 6 E. & B. 986. Where the delivery as an escrow is proved

by a letter sent with the instrument, it is for the court to construe its effect; *aliter* if proved by oral evidence of extrinsic facts. *Furness v. Meek*, 27 L. J., Ex. 34.

The defence that the alleged deed was delivered as an escrow only, on a condition which has not been performed, was formerly raised by the plea of *non est factum*; *Millership v. Brookes*, 5 H. & N. 797; 29 L. J., Ex. 369; but it would now require to be specially pleaded. See Rules 1883, O. xix. r. 15, *ante*, p. 72.

Proof of attested Deed by secondary Evidence.] It has been sometimes contended that, if the original document has been attested, the attesting witnesses must be called. But where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce: it was held, that on the non-production of the deed, the plaintiff might give oral evidence of the contents without calling the subscribing witness, although his name was known to the plaintiff, and he was actually in court. *Cooke v. Tanswell*, 8 Taunt. 450. So in debt by landlord for double value; plea "no demand;" the plaintiff, having given notice to produce, offered to prove the original demand by a copy in which an attestation had been also copied, and to show that the original was signed by him: held, that the production of the attesting witness (though known to the plaintiff) was unnecessary. *Pools v. Warren*, 8 Ad. & E. 583. So where notice was given to produce a deed in the defendant's possession, and the defendant at the trial refused to do so, the plaintiff was allowed to prove it by a copy without calling any attesting witness; and it was held that the defendant could not put the plaintiff to a strict proof by afterwards producing the attested original. *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 413. Where the plaintiff declared on a lost deed, and a witness stated that there were subscribing witnesses, but he did not know their names, it was ruled by Lord Kenyon, that the plaintiff might recover without calling them. *Keeling v. Ball*, Peake Ev. App. 82. But he said that "had it appeared who they were, the plaintiff must certainly have called them." If in such a case the witnesses are dead, and the execution by the party to the instrument is proved, it is questionable whether proof of the handwriting of the witnesses is in any case necessary; at all events, if the attesting witness can be identified with a deceased person, this will dispense with further proof of his handwriting; for the only object of such last-mentioned proof is to establish his identity. *R. v. S. Giles's, Camberwell*, 1 E. & B. 642; 22 L. J., M. C. 54.

Proof and Comparison of Handwriting.] The result of the various cases on this head is thus stated by Mr. Justice Patteson in *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 730, 731, where references to all the authorities will be found. "That knowledge" [*i. e.* of handwriting] "may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents,

or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him."

To prove the handwriting of a member of Parliament, the opinion of a clerk employed to inspect franks, who never had occasion to verify his handwriting, was held insufficient. *Batchelor v. Honeywood*, 2 Esp. 714; *Cary v. Pitt*, Peake Ev., App. 84. And where an attorney acted on a written retainer, purporting to be signed by A., B., and C., being acquainted with the handwriting of A. and B. only, his testimony to that effect is insufficient to prove the signature of C. *Drew v. Prior*, 5 M. & Gr. 264. A witness cannot be permitted to give his opinion of the handwriting from extrinsic circumstances, such as his knowledge of the party's character and habits. *Da Costa v. Pym*, Peake Ev. App. 85.

In the case of ancient documents, where it is impossible for any witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents. *B. N. P.* 236; *Taylor v. Cook*, 8 Price, 652; and see other cases cited, *Doe d. Mudd v. Suckermore*, *ante*, p. 130; also *Fitzwalter Peerage case*, 10 Cl. & Fin. 193; *Lindsay Peerage*, 2 H. L. C. 557. Ancient writings (as a receiver's account 100 years old) may be laid before a witness at the trial for his inspection; and upon his judgment of their character, so formed, his belief as to the handwriting of the document in question may be inquired into. *Doe d. Tilman v. Turner*, Ry. & M. 143; and see *Roe d. Brune v. Rawlings*, 7 East, 282. A copy of a parish register purporting to be signed by the curate 80 years ago may be received with no other proof of handwriting than the evidence of the present parish clerk, who speaks from his having seen the same handwriting attached to other entries in the register. *Doe d. Jenkins v. Davies*, 10 Q. B. 314. In these cases the question often becomes one of skill; the character of the writing varying with the age, and the discrimination of it being assisted by antiquarian study. *Per Coleridge, J.*, *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 718.

It has been a question how far, and under what circumstances, handwriting in modern instruments can be proved or disproved by the testimony of a witness, founded on the mere comparison of different signatures. In the case of *Doe d. Mudd v. Suckermore*, *ante*, p. 130, the K. B. judges were equally divided on the question whether, after a witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison pending the trial with other signatures admitted to be those of the witness. It has also been doubted whether a person practised in the examination of handwriting can be called to state his opinion whether a writing is in a feigned or a genuine hand. *Gurney v. Langlands*, 5 B. & A. 330; *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 751. It has, however, been held, that under certain circumstances the court and jury may be permitted to institute a comparison between documents for the purpose of verifying handwriting when a witness called expressly for that purpose would be rejected. Thus in *Griffith v. Williams*, 1 C. & J. 47, it was held that the rule as to the comparison of handwriting does not apply to the court or jury, who may compare two documents when

they are both properly in evidence. But the documents with which the handwriting is compared must be such as are in evidence for *other* purposes in the cause, and not put in or selected by the party merely for comparison. *Doe d. Perry v. Newton*, 5 Ad. & E. 514, 534; *Griffiths v. Ivery*, 11 Ad. & E. 322. To put such selected documents into the hands of the witness, merely for the purpose of shaking his credit by subsequent independent evidence contradicting his testimony as to those documents, would tend to raise collateral issues. *Hughes v. Rogers*, 8 M. & W. 123. This course has, however, been held admissible where the object was to show that the plaintiff was the author of an anonymous letter, by putting in evidence other letters in which he had misspelt defendant's name in the same way as in the anonymous letter. *Brookes v. Tichborne*, 5 Exch. 929.

Some of the questions discussed above are now disposed of by the C. L. P. Act, 1854, s. 27, which provides, that "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

This section allows documents proved to be genuine but not relevant to the issue, to be put in for the purpose of comparison. *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24. For this purpose the disputed writing must be produced in court; and the section does not therefore apply to documents which are not produced, and of which it is sought to give secondary evidence. *Arbon v. Fussell*, 3 F. & F. 152, *cor.* Wilde, B. Where the question is as to the handwriting of a witness, and the witness in cross-examination was induced to write on a piece of paper, this writing may be used for comparison under the section. *Cobbett v. Kilminster*, 4 F. & F. 490. It may, of course, be a question how far writing so obtained is a fair test of the ordinary handwriting of the witness. If the genuineness of the document sought to be put in is disputed, a collateral question is raised which must first be decided; *Cooper v. Dawson*, 1 F. & F. 550; like all other collateral issues, by the judge. *Bartlett v. Smith*, 11 M. & W. 483; *Boyle v. Wiseman*, 24 L. J., Ex. 284.

Proof of Execution, when dispensed with.] When a deed is 30 years old, it proves itself, and no evidence of execution is necessary. B. N. P. 255. So with regard to a steward's books of receipts, without proof of his handwriting, if they come from the proper custody, *Wynne v. Tyrrohatt*, 4 B. & A. 376; private letters, *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; a will produced by the officer of the Ecclesiastical Court, *Doe d. Howell v. Lloyd, Peake Ev.*, App. 41; a bond, *Chelsea Waterworks Co. v. Cowper*, 1 Esp. 275; and other old writings, *Fry v. Wood*, 1 Selw. N. P., 13th ed. 495, n. Even in cases in which attestation is requisite, and it appears that the attesting witness is alive and able to attend, it is unnecessary to call him where the instrument is 30 years old. *Doe d. Oldham v. Wolley* 8 B. & C. 22.

But where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody; B. N. P. 255; or it should be shown that possession has accompanied it, at least where it purports to convey something which is the subject-matter of possession. Gilb. Ev. 97. See *Custody of Antient Writings*, ante, pp. 97, 98. Whether the custody is suspicious is a question for the judge. *Doe d. Shrewsbury, El. of, v. Keeling*, 11 Q. B. 884. It has, indeed, been held sufficient, on an appeal against a removal, for the respondent parish to produce a certificate 30 years old, without showing that it had been kept in the parish chest; *R. v.*

Ryton, 5 T. R. 259 ; and see *R. v. Netherthong*, 2 M. & S. 337 ; but see on this point, *Evans v. Rees*, 10 Ad. & E. 151, and other cases cited, *ante*, pp. 97, 98. It was formerly considered that if there was any rasure or interlineation in an old deed, it ought to be proved in a regular manner by the witness, if living, or by proof of his handwriting and that of the party, if dead, in order to obviate the presumption which otherwise arises against the instrument. B. N. P. 255. See the rule as to the alterations and interlineations in bills of exchange, *post*, *Actions on Bills of Exchange—Defence—Alteration*. In documents of remote antiquity it is evidently impossible to supply such proof ; and, accordingly, in such documents defects of this kind are, in practice, treated only as matter of observation to the jury, unless they are of sufficient importance to warrant the judge in excluding them altogether. *Accord. Roe d. Ld. Kimbleston v. Kemmis*, 9 Cl. & Fin. 774 ; and *Evans v. Rees*, *supra*. And the rule now is, that interlineations, &c., in a deed are presumed to have been made before execution. *Doe d. Tatum v. Catomore*, 16 Q. B. 745 ; 20 L. J., Q. B. 364. It is otherwise in the case of wills. S. C. 16 Q. B. 747 ; *vide post*, p. 135.

Where a party, producing a deed upon a notice, claims a beneficial interest under it, it is not necessary for the party calling for the deed to prove the execution of it ; for in such a case the defendant, by claiming under it, accredits it as against him, though not to the extent of estopping him. *Pearce v. Hooper*, 3 Taunt. 60. Thus proof was unnecessary where assignees produced the assignment of the bankrupt's effects. *Orr v. Morice*, 3 B. & B. 139. So, in an action by a lessee against the assignee of the lease for breach of a covenant in the original lease, the plaintiff having proved a counterpart of the lease and the defendant having put in the original, it was held unnecessary for the plaintiff to prove the execution of it, though the defendant had assigned over the lease before action. *Burnett v. Lynch*, 5 B. & C. 589. So in an action against the vendor of an estate to recover a deposit on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 M. & Rob. 143. And where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises to prevent its being set up by the defendants, it was held, that this was a recognition of the lease as a valid instrument ; and that, when produced in pursuance of notice from the defendants, it might be read by them without proof of execution, though the attorney had furnished them with the names of the attesting witnesses, and though the plaintiff's title was independent of the lease. *Doe d. Tyndale v. Heming*, 6 B. & C. 28. It is immaterial that the party calling for it denies its validity ; as where the defendant produces an assignment of a bankrupt's goods which the plaintiff (trustee of the bankrupt) impugns as fraudulent. *Carr v. Burdiss*, 1 C. M. & R. 782. Where notice was given to defendant to produce a feoffment under which he was in possession of land, the plaintiff proved by secondary evidence (the feoffment not being produced), that it had livery indorsed, and was witnessed : held, that it was unnecessary, as against defendant, to call the witness, or to prove livery. *Doe d. Rowlandson v. Wainwright*, 5 Ad. & E. 520. In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond, produced by the defendant, is admissible in evidence against him, without proof of execution. *Scott v. Walthman*, 3 Stark. 169. So, where the sheriff has assigned it to the plaintiff. *Barnes v. Lucas*, Ry. & M. 284.

Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Gordon v. Secretan*, 8 East, 548. *Doe d. Wilkins v. Cleveland, Ms. of*, 9 B. & C. 864.

So, if the party producing it claim an interest in it, but an interest *unconnected with the cause*; as where the action is for commission for procuring an apprentice for defendant, and the instrument produced is the deed of apprenticeship; *Rearden v. Minter*, 5 M. & Gr. 204, 206, *per cur.* And a party producing at the trial of a cause a deed which has been some months in his possession is not excused from proving the execution, merely because he received such deed from the adverse party who formerly claimed a beneficial interest in it. *Vacher v. Cocks*, 1 B. & Ad. 145. As the principle of the cases is, that the party, who claims an estate or interest under the instrument in his possession impliedly affirms its due execution, the rule is inapplicable to instruments that merely testify contracts under which no permanent interest passed. Therefore, where defendant wished to show himself to be a partner with A., under whom plaintiff sued, it was held, that a contract in the plaintiff's possession to do some works for the firm, produced on notice by the plaintiff, must be proved by the defendant. *Collins v. Bayntun*, 1 Q. B. 117; *Rearden v. Minter*, *supra*.

It seems that when an executor showed payment of a bond under *plene administravit*, he must have proved the bond in the regular way, except, perhaps, in an action on a simple contract. B. N. P. 143. See *post*, Part III., *Actions against Executors*.

A deed may be given in evidence without proof of execution, if its execution or the handwriting of the witness be one of the admissions in the cause (*ante*, pp. 60, 70, 71), or admitted on the pleadings, or if the party be estopped to dispute it, as by recital, &c. (*ante*, p. 73). But the estoppel is confined to the part recited; and if the party wishes to prove more, he must prove it in the usual way. *Gillett v. Abbott*, 7 Ad. & E. 783.

Deeds enrolled or registered.] Where a deed, to the efficacy of which enrolment is essential (as a bargain and sale under 27 Hen. 8, c. 16), is accordingly enrolled, proof of the enrolment by an examined copy will dispense with evidence of the execution by any of the parties to the original deed. *Thurle v. Madison*, Styles, 462; *Smartle v. Williams*, 1 Salk. 280. And this is also provided in the case of deeds of bargain and sale, enrolled *and pleaded*, by stat. 10 Ann. c. 28, s. 3. So where a deed, to which enrolment is not essential, is enrolled on the acknowledgment of one of the parties, it is evidence of execution *against that party*. B. N. P. 255, 256. But it should seem that, unless such enrolment be rendered evidence by force of an Act of Parliament, it will not dispense with proof by a subscribing witness (where a subscribing witness is necessary), or otherwise as the case may be. *Gomer-sall v. Serle*, 2 Y. & J. 5; *Giles v. Smith*, 1 C. M. & R. 470.

The enrolments in the Chancery of Crown grants and the enrolments in the Duchy office of leases, &c., of the possessions of the Duchy of Cornwall (and *ut semb.* of the Duchy of Lancaster), are primary evidence of the grants, and may be proved by examined copies, or copies otherwise authenticated. See *Roice v. Brenton*, 3 M. & Ry. 218, *ante*, p. 106. An enrolment of a lease in the Land Revenue Office was indeed rejected as evidence of the lease in *Jenkins v. Biddulph*, Ry. & M. 339; but this seems to have turned on the wording of an Act of Parliament. Several statutes have since facilitated the proof of deeds and grants of crown lands and those of the Royal Duchies; as 2 Will. 4, c. 1, s. 26, in respect of lands in the survey of the Office of Woods, &c., which makes the memorandum endorsed on the deed to be proof of the making of it and of the due enrolment, without proof of the officer's signature; so 11 & 12 Vict. c. 83, s. 6, as to the proof of enrolments in the Duchies of Lancaster and Cornwall.

The official indorsement of enrolment or registration on deeds which

are by statute required to be enrolled or registered, is of itself *prima facie* evidence of the enrolment or registration. *Kinnersley v. Orpe*, 1 Doug. 56; *Doe d. Williams v. Lloyd*, 1 M. & Gr. 671; *Grindell v. Brendon*, 6 C. B. N. S. 698; 28 L. J. C. P. 333; *Waddington v. Roberts*, L. R. 3 Q. B. 579. See *Mason v. Wood*, 1 C. P. D. 63, *ante*, p. 42. The date of enrolment indorsed by the clerk of enrolments is conclusive evidence of the date. *R. v. Hopper*, 3 Price, 495. The memorial of a conveyance registered in a county register is presumed to be correct against those who claim through a person who registered the deed; *Wollaston v. Hakevill*, 3 M. & Gr. 297; but not against other persons; *Hare v. Waring*, 3 M. & W. 379; *per Parke*, B.

Proof of Wills of Personality.

A will relating to personalty is scarcely ever used in evidence in a court of law, and, therefore, it is rarely necessary to prove it. The probate granted by the proper court is the proper evidence of such a will. See *Proof of Probate*, *ante*, pp. 111, 112.

Proof of Wills of Land.

Production of the Will.] At common law, in order to prove a devise of lands the will itself must be produced, for, except under the circumstances mentioned hereafter (*post*, pp. 140, 141), probate of the will is not even secondary evidence; as the Spiritual Court had no power to authenticate a will *quoad* anything but personalty. *Doe d. Ash v. Calvert*, 2 Camp. 389; B. N. P. 246. But where the will is lost, the register or ledger-book of the Ecclesiastical Court, or an examined copy of it, has been admitted as secondary evidence. B. N. P. 246. It is presumed that in such case the will must be of personal as well as real estate, otherwise the Court would have no jurisdiction to register the will. The same principle applies to the jurisdiction of the Probate Division. *In re Bootle*, L. R., 3 P. & M. 177. A lost will may be proved by a copy otherwise authenticated; *Sly v. Sly*, 2 P. D. 91; or by oral evidence; *Brown v. Brown*, 8 E. & B. 876; 27 L. J., Q. B. 173; see also 2 Camp. 390, n.; even though given by an interested witness; *Sugden v. S. Leonards, Ltd.*, 1 P. D. 154, C. A. It may also be proved by written or oral declarations of the testator made before or after the execution of his will. S. C. Effect will be given to a lost will so far as its contents are proved. S. C. An interlineation or alteration in a will is presumed to have been made *after* the execution of it; *Cooper v. Bockett*, 4 Moo. P. C. C. 419; *Doe d. Tatum v. Catmore*, 16 Q. B. 745, 747; *Doe d. Shallcross v. Palmer*, *Id.* 47; 20 L. J., Q. B. 367; but in the case of the interlineation of mere words required to complete the sense of the will, if they are written apparently at the same time with the same ink, this presumption is not a necessary one. *In re Cadge*, L. R. 1 P. & M. 543. The declarations of the testator made before execution are admissible to prove the then state of the will; *vide ante*, p. 53.

Proof of Execution.—Statutes.] The following are the statutory provisions severally relating to the execution of wills before 1st Jan., 1838, and on and since that date.

By the Stat. of Wills (32 Hen. 8, c. 1), s. 1, a will of lands was required to be in writing. By the Stat. of Frauds (29 Car. 2, c. 3), s. 5, all devises and bequests of any lands or tenements, "shall be in writing and signed by the party so devising the same, or by some other person in his presence,

and by his express directions, and shall be attested and subscribed in the presence of the said deviser by three or four credible witnesses, or else they shall be utterly void and of none effect." This sect. is still in force as to wills made before 1st Jan., 1838.

By the Wills Act (1 Vict. c. 26), s. 9, "no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." By sect. 13, "every will executed in manner hereinbefore required shall be valid without any other publication thereof." This act by sects. 1, 34, applies to any will, codicil or appointment in exercise of a power made or re-executed, or re-published or revived by any codicil on or after 1st Jan., 1838.

The signing required by sect. 9 is to be "at the foot or end" of the will. As this provision gave occasion to some very inconvenient decisions upon the precise situation of the signature, it was enacted, by 15 & 16 Vict. c. 24, s. 1, that the will shall be valid if the signature be so placed at, or after, or following, or under, or beside, or opposite to the end of the will that it shall be apparent that the testator intended to give assent by such signature to the writing signed as his will. But no signature under the act is to give effect to any disposition which is underneath it, or follows it, or is written after the signature shall be made.

By sect. 2, these provisions extend to every will already made, where administration or probate has not already been granted, or where the property has not been possessed or enjoyed by some person, or the right thereto has not been decided to be in some other person than the persons claiming under the will in consequence of the defective execution of such will.

The following decisions under the Stat. of Frauds, s. 5, *ante*, p. 135, are retained, as being often applicable to the proof of wills made since the Wills Act. The decisions under the Wills Act are collected, *post*, p. 138.

Signing.] Notwithstanding some earlier cases to the contrary, it is now the better opinion that sealing, without signing, is not a sufficient execution within the Stat. of Frauds. *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. 458. It is sufficient under that Statute, if the testator signs his name at the beginning of the will. *Lemayne v. Stanley*, 3 Lev. 1; S. C. Freem. 538. If the will is written on several sheets, and the testator signs some and intends to sign the rest, but does not, this is not a sufficient execution; *Right v. Price*, 1 Doug. 241; but where a will, written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides and had put his hand and seal to the last, and in fact he had put his hand and seal to the last, but had omitted to sign the two other sides, the execution was held good, the signing of the last sheet showing that the former intention had been abandoned. *Winsor v. Pratt*, 2 B. & B. 650.

Where a codicil was duly executed and attested by three witnesses and written on the same paper with an unexecuted will to which it expressly referred: it was held, that such execution gave effect to the will, and that it thereby became a good will of lands. *Doe d. Williams v. Evans*, 1 Cr. & M. 42; S. C. 3 Tyr. 56. So, a codicil whereby the testator confirms his will, gives validity to an unattested alteration in a devise made after the execution of the will; and to a testamentary paper purporting to be a devise

unattested and unannexed to the will, if distinctly referred to by such codicil; 1 Wms. Exors., 8th ed., pp. 93 *et seq.* The existence and identity of such paper must be proved by parol evidence. *In re Heathcote*, 6 P. D. 30. But a codicil may operate as a partial republication only. *Monypenny v. Bristow*, 2 Russ. & Myl. 117. Where the testator is blind, it is not necessary to read over to him the will in the presence of the attesting witnesses previously to execution. *Longchamp d. Goodfellow v. Fish*, 2 N. R. 415. A signature by mark or initials is sufficient. *Baker v. Denning*, 8 Ad. & E. 94; *In re Blewitt*, 5 P. D. 116. Where a testator requested another person to sign his will for him, which the other did in his own name, that is sufficient. *In re Clark*, 2 Curt. 329.

Under the Wills Act (1 Vict. c. 26), s. 9, *ante*, p. 136, the will must be signed at the foot or end thereof; see also 15 & 16 Vict. c. 24, *ante*, p. 136.

Attestation.] The Statute of Frauds does not direct that the witnesses shall see the testator sign; therefore, it is enough if the testator acknowledge to the witnesses, either separately or all together, that the will or handwriting is his. *Stonehouse v. Evelyn*, 3 P. Wms. 254; *Johnson v. Johnson*, 2 Cr. & M. 140. But where the attestation purported that the will had been signed in the presence of the three witnesses who, in his presence and that of each other, signed the attestation, it was held insufficient to call one of them, who stated that he and another saw the testator sign, but that the third, whose signature was proved, was not then present. *Doe v. Lewis*, 7 C. & P. 574. It is sufficient, though the witnesses do not know the paper to be the testator's will. *Wright v. Wright*, 7 Bing. 457. If the witnesses set their marks to the will, it is enough; *Harrison v. Harrison*, 8 Ves. 185; *Harrison v. Elwin*, 3 Q. B. 117; and they may attest it at several times; *Cook v. Parson*, Prec. in Chanc. 185; but in that case one witness alone will not be able to prove the due execution of the will. The witnesses need not attest every page, but all the will should be in the room at the time of attestation; whether it was so or not is a question for the jury. *Bond v. Seavell*, 3 Burr. 1773; *Lea v. Libb*, 3 Mod. 262. The witnesses must attest and subscribe the will in the presence of the testator; but it is enough if the testator was in such a position that he *might* see the witnesses attest; as where he was in one room and the witnesses in another, and he might have seen them through a window. *Shires v. Glascock*, 2 Salk. 688. So where the testator was in bed, and the witnesses retired through a short passage into another room, and attested the will opposite to the door, which was open, as well as the door of the testator's room. *Davy v. Smith*, 3 Salk. 395; *Todd v. Winchelsea*, El. of M. & M. 12. So where the testatrix sat in her carriage opposite the window of the attorney's office in which the will was attested. *Casson v. Dade*, 1 Bro. Ch. C. 99. But where the will was attested in an adjoining room, and the jury found that in one part of the room in which the testator was, a person inclining forward with his head out of the door might have seen the witness, but that the testator was not in such a situation, the execution was held invalid. *Doe d. Wright v. Manifold*, 1 M. & S. 294. The test in these cases seems to be "whether the testator might have seen, not whether he did see, the witnesses sign their names." *In re Trimmet*, 11 Jur., N. S. 248, Feb., 1865, *per* Wilde, J. O. Making a mark is a sufficient subscription. *Doe d. Davies v. Davies*, 9 Q. B. 648. The attesting witnesses may subscribe their names in any part of the will, and not exclusively at the end of it; nor is any *testimonium* clause, or form of attestation necessary. *Roberts v. Phillips*, 4 E. & B. 450. It seems, however, that, where there is no such clause to show whether they sign as

attesting witnesses there must be extrinsic proof of it. *Id.* 457. And this decision applies as well to the new as to the old Wills Act. *Ibid.*

Under the Wills Act, 1 Vict. c. 26, s. 9, *ante*, p. 136, the witnesses must both be present at the same time when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, but not necessarily, it seems, of each other; *Cooper v. Bockett*, 3 Curt. 659, *per* Sir H. Jenner Fust; assumed *per cur.* on appeal, 4 Moo. P. C. C. 419; *Faulds v. Jackson*, 6 Notes of Cas. Suppl. i. (14th June, 1845). In *Casement v. Fulton*, 5 Moo. P. C. C. 130 (argued June 17th—19th; judgment 25th July, 1845), it was held on the construction of a similar clause in the corresponding section of the Indian Wills Act (which however omits the words "shall attest and"), without reference to *Faulds v. Jackson*, *supra*, that the witnesses must also subscribe in the presence of each other. This decision which was based on the words "such witnesses," has not been followed; see 1 Wms. Exors., 8th ed. 91; *Ld. S. Leonard's Handy Book of Property Law*, 8th ed. 244. The testator must sign or acknowledge his signature to both witnesses present together, before either of them attests. *Cooper v. Bockett*, *supra*; *Hindmarsh v. Charlton*, 8 H. L. C. 160. If a witness sign before the testator an acknowledgment by him of his signature after execution by the testator is insufficient. S. C.; *Moore v. King*, 3 Curt. 243. It is sufficient if the witnesses sign with their initials. *In re Blevitt*, 5 P. D. 116. As no form of attestation is necessary, the mere subscription of two names, without calling themselves witnesses, will be *prima facie* sufficient. *Bryan v. White*, 2 Rob. Ecc. Rep. 315. An acknowledgment by a testator of his signature previously affixed is sufficient, if the will bearing his signature, visibly apparent on the face of it, be produced to two witnesses present together, and they are asked by him, or in his presence to subscribe the same. *Gaze v. Gaze*, 3 Curt. 451; *In re Ashmore*, *Id.* 756; *Inglesant v. Inglesant*, L. R., 3 P. & M. 172. But where the witnesses neither see nor have the opportunity of seeing the signature, the acknowledgment is insufficient, even although the testator declares the paper to be his will. *Blake v. Blake*, 7 P. D. 102, C. A. See further, 1 Wms. Exors., 8th ed. 89, 90; and generally as to the signature and attestation requisite under the Wills Act, *Id.* 76 *et seq.*

What Witness must be called.] To prove a will of land it is sufficient to call one of the witnesses, if he can speak to all the requisites of attestation. B. N. P. 264; *Longford v. Eyre*, 1 P. Wms. 741; *Belbin v. Skeates*, 1 Sw. & Tr. 148; 27 L. J., P. M. & A. 56; following *Wright v. Doe d. Tatham*, *infra*.

It was held that on an issue of Chancery all the witnesses ought to be called. *Bootle v. Blundell*, 19 Ves. 494. Though this was the general rule in cases where the suit was instituted by the devisee to establish the will, yet where the suit was by the heir against the devisee for the purpose of setting aside the will, the devisee was not required to produce all the witnesses. *Tatham v. Wright*, 2 Russ. & Myl. 1. Upon the trial of an ejectment brought by the heir for the recovery of the same lands as those mentioned in the last case, one of the attesting witnesses who proved the will on the issue out of Chancery, having died, the defendant proved his testimony from the shorthand writer's notes, which were held to be sufficient evidence of the execution of the will, though another attesting witness was present at the trial. But the previous proceedings in the Court of Chancery upon which an issue had been found for the devisee, were held not to be in evidence of the execution. *Wright v. Doe d. Tatham*, 1 Ad. & E. 3; Ex. Ch.

Proof where the Witnesses are dead, or deny their Attestation.] Where the witnesses are dead, this fact and their handwriting should be proved. "Where the attestation clause recites a compliance with all the requisite ceremonies in respect of all the witnesses, it is enough in order to make a *prima facie* case, to prove the death of all, and the handwriting of one of them; because it will be presumed that everything the witness thus declared by his attestation to have been done, was really done." *Andrew v. Motley*, 12 C. B., N. S. 527, 532; 32 L. J., C. P. 128, 130, *per Williams, J.* Though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will. *Croft v. Pawlett*, 2 Stra. 1109; *Hands v. James*, 2 Comyn, 531; *Doe d. Davies v. Davies*, *infra*. And it seems that a general form of attestation must be taken as affirming that all has been done in the presence of the witnesses which is stated in the body of the instrument. *Buller v. Burt*, *coram Leach*, M. R., cited 4 Ad. & E. 15. The principle of these decisions seems to be fully recognised in *Doe d. Spilsbury v. Burdett*, 4 Ad. & E. 1; and S. C. in D. P., 6 M. & Gr. 386; 10 Cl. & F. 340 (see this case *infra*).

Even although the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. *Lowe v. Jolliffe*, 1 W. Bl. 365; *Bowman v. Hodgson*, L. R., 1 P. & M. 362; see *Wright v. Rogers*, *Id.* 678. Where one witness gives evidence against due execution, the party supporting the will must call the other witness. *Owen v. Williams*, 32 L. J., P. M. & A. 159; *Coles v. Coles*, L. R., 1 P. & M. 70. A will was attested by three witnesses, one (standing second) being a marksman and the other two being dead, the handwriting of these two was proved, but the marksman being produced, recollected nothing of his signature; he was very old, and had known the testator; the will was uncontested for 16 years: held that the jury might presume the due execution of the will under the circumstances. *Doe d. Davies v. Davies*, 9 Q. B. 648. From these cases it does not seem to be in general necessary to produce evidence *aliunde* that the formalities not mentioned in the attestation clause were gone through. But it is certainly safer to do so, if possible. See *Vinnicombe v. Butler*, 3 Sw. & Tr. 580; 34 L. J., P. M. & A. 18.

Where two of the witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible. *Doe d. Stephenson v. Walker*, 4 Esp. 50; *Provis v. Reed*, 5 Bing. 435.

Proof of Wills thirty years old.] A will 30 years old, coming from the proper custody, will be presumed, in the same way as a deed, to have been duly executed, although it bear some marks of cancellation. *Andrew v. Motley*, *supra*. As to proper custody, see *Custody of ancient writings*, *ante*, pp. 97, 98.

In *Doe d. Spilsbury v. Burdett*, *supra*, it was considered by the Q. B. that, where the instrument creating a power required it to be executed by will, to be "signed, sealed, and published in the presence of, and attested by three or more credible witnesses," the will, although 30 years old, must bear an attestation that it was regularly executed according to the power (see 4 Ad. & E. 19). But this strictness as to the attestation clause applied only to wills executed under powers; in other cases of wills, as in the case of deeds, the attestation clause was by no means conclusive as to what was done. Even the oral testimony of the attesting witnesses is not so; *Lowe v. Jolliffe*, and *Bowman v. Hodgson*, *supra*; and the decision in *Andrew v. Motley*, *supra*, would be strong to show that the admissibility of a will 30 years old without proof of execution was not affected by such a defect in the clause of

attestation. See further, *post*, p. 142. The execution of powers by will on and since 1st Jan., 1838, has been much simplified by 1 Vict. c. 26, s. 10, *post*, p. 142.

Under the old law it was held that the 30 years were to be reckoned from the date of the will being executed. *Doe d. Oldham, v. Wolley*, 8 B. & C. 22. The fact that under sect. 24, a will, *with reference to the estate comprised therein*, now speaks from the death of the testator would not seem to alter this principle.

Interested attesting Witness.] Formerly if a will were attested by a person, who, or whose wife, or husband took any interest thereunder, the will was void because it could not be proved; this was remedied as to an interested witness himself, by stat. 25 Geo. 2, c. 6, s. 1, which made such witness competent to prove the will, but avoided the devise to him; sect. 2 made creditors competent witnesses, although the will charged the debts on the real estate. This act still applies to wills made before 1st Jan., 1838. As to the competency of the husband of a devisee, see *Hatfield v. Thorpe*, 5 B. & A. 589.

By the Wills Act (1 Vict. c. 26), s. 14, if the attesting witness to a will be incompetent to prove it at the time of execution or afterwards, the will shall not be invalid on that account; and by sect. 15, if the attesting witness, or the wife or husband of the witness, be a beneficial devisee, &c., the devise shall be void, and the witness competent; and by sect. 16, in the case of a will charging real or personal estate with debts, a creditor, or the wife or husband of one, may attest the will, and prove its execution; and by sect. 17, the executor is admissible to prove the execution, or the validity or invalidity of a will. This act, by sects. 1, 34, applies to all wills made or re-executed on or after 1st Jan., 1838.

A devise to an attesting witness is void though there are three other attesting witnesses. *Doe d. Taylor v. Mills*, 1 M. & Rob. 288. Where a will attested by A. contains a devise to A. and is confirmed by a codicil not attested by A., the devise is good, for the codicil incorporates the will, and they form one instrument. *Anderson v. Anderson*, L. R., 13 Eq. 381. The marriage, after attestation, of the attesting witness to a devisee does not affect the devise. *Thorpe v. Bestwick*, 6 Q. B. D. 311.

The Act for making interested witnesses competent (6 & 7 Vict. c. 85), provides that it shall not affect the new Wills Act; but the Statute of Frauds is not referred to in it.

Proof by Probate.] The Probate Court Act (20 & 21 Vict. c. 77), after providing by sect. 61, that where a will affecting real estate is proved in solemn form, or is the subject of any contentious proceeding, the heir and persons interested in the real estate shall be cited, enacts by sect. 62, that "where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty's Court of Probate" (*vide infra*), "shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate;

and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law, or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." Sect. 63 provides, "that the probate, decree, or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

By sect. 64, in any action, "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate" (*vide infra*); "and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." By sect. 65, "In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

The jurisdiction of the Court of Probate is now transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is by sect. 34 assigned to the Probate, Divorce, and Admiralty Division. Probates are therefore now sealed with the seal of that Division.

If the party receiving the ten days' notice under the above section give the four days' counter-notice that he disputes the validity of the devise, the probate will not be admissible in evidence; but if he do not give the counter-notice, he may nevertheless at the trial dispute the validity of the will, for "sufficient evidence" here means only *prima facie* evidence. *Barraclough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch. *Seem*, that the notice should be given to the solicitor of the opposite party. S. C. Where the notice has not been given under the act the judge may adjourn the cause to allow of the notice being given or to allow proof of the will *per testes*; see *Hilliard v. Eiffe*, L. R., 7 H. L. 39, 49, *per* Ld. Cairns, C.

Proof of Execution of Powers.

As a general rule, all the circumstances required by the creator of a power, however otherwise unimportant, must be observed, and cannot be satisfied but by a strict and literal performance. *Per* Ld. Ellenborough, C. J., *Hawkins v. Kemp*, 3 East, 440. And when the power directs

attestation and other formalities the attestation must notice the compliance with the formalities. Thus where it was to be executed "by any deed or writing under the hands and seals of the parties, to be by them duly executed in the presence of, and attested by two or more witnesses;" it was held that as the attestation stated only a sealing and delivery, and omitted the signing, the power was not duly executed; *Doe d. Mansfield v. Peach*, 2 M. & S. 576; and a subsequent correct attestation, indorsed upon the instrument after the death of one of the parties, would not remedy the defect, S. C.; *Wright v. Wakeford*, 2 Taunt. 214. So, if the power is to be executed by an appointment to be signed and published in the presence of, and attested by two witnesses, and the attestation omits to mention the publication. *Moodie v. Reid*, 7 Taunt. 355. But where the attestation mentioned "delivery," this has been held equivalent to publication. *Ward v. Swift*, 1 Cr. & M. 171.

The cases above referred to assume, however, rather than expressly decide, that, if the attestation is deficient, the deficiency cannot be supplied by evidence *aliunde* that the formalities were all gone through. But this is directly contrary to the law, in the analogous case of formalities required by statute; and perhaps after the language of Lord Lyndhurst, in *Burdett v. Doe d. Spilsbury*, 6 M. & Gr. 461, and of Ld. Campbell, at pp. 468 *et seq.*, it will be held, if the question should arise, that the attestation clause is not conclusive. Indeed, Ld. Campbell, in *Newton v. Ricketts*, 9 H. L. C. 262; 31 L. J. Ch. 247, says that the *ratio decidendi*, in *Burdett v. Doe d. Spilsbury*, was that such extrinsic evidence might be given. This was certainly not so. But still this expression of opinion gives to the view under discussion the full weight of Lord Campbell's authority. On the other hand, we have, in *Burdett v. Doe d. Spilsbury*, Lord Brougham's express refusal to overrule the cases which lay down the very strict rule requiring all the formalities to be noticed in the attestation. See 6 M. & Gr. 465.

When the instrument creating the power does not require attestation, an informal or imperfect one will not invalidate. Sugd. Pow. 8th ed. 235, 247. The defect of omitting to state in the attestation the signing of the instrument was cured by stat. 54 Geo. 3, c. 168, with regard to powers *theretofore* executed; but the act was only retrospective, and has now been repealed by the Stat. Law Revision Act, 1873. Leases defectively executed under powers may now be confirmed by acceptance of rent under the circumstances provided for in statutes 12 & 13 Vict. c. 26, and 13 & 14 Vict. 17.

The Wills Act, 1 Vict. c. 26, abrogated the necessity of following the formalities prescribed by the donor of a power to be exercised by a will or appointment in the nature of a will; for it provides (sect. 10) that "no appointment *made by will*, in exercise of any power, shall be valid, unless the same be executed in manner *hereinbefore required*; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." Hence the execution of wills in virtue of powers must hereafter conform to the regulations pointed out in the 9th section of the act, *ante*, p. 136. A will executed with only the formalities prescribed in this section will not satisfy the condition of a power to be exercised "by any instrument in writing to be by her signed sealed and delivered in the presence of and attested by two or more credible witnesses," *Taylor v. Meads*, 4 D.

J. & S. 597 ; 34 L. J., Ch. 203. Such a power is, however, satisfied by a will expressed to be "signed, sealed, acknowledged, and declared" in the presence of the attesting witnesses. *Smith v. Adkins*, L. R. 14 Eq. 402.

The above section only applies to powers to be executed *by will*; but by a later Act, 22 & 23 Vict. c. 35, a like remedy has been provided for the relief of donees of powers to be exercised otherwise than by will; for by sect. 12, a deed executed after August 13, 1859, in the presence of and attested by two or more witnesses in the ordinary manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or instrument in writing not testamentary, although some other execution, attestation, or solemnity may have been prescribed by the donor; provided that this shall not dispense with any requirement prescribed by him other than the manner of execution or attestation, nor prevent the donee from executing the power in the manner prescribed by the donor.

There is, however, a notable difference between this and the act relating to wills under powers, viz., that a will under a power *must* conform to the provisions of 1 Vict. c. 26, whereas an appointment made since 22 & 23 Vict. c. 35, may be executed in the manner prescribed either by that act or by the donor of the power. The last Act is retrospective so far as regards the instrument creating the power.

Proof of Awards.

As to proof of awards generally, *vide post*, *Action on Awards*.

As to proof of awards made by commissioners under Inclosure Acts, &c., it is provided by the general Act, 41 Geo. 3, c. 109, s. 35, and also by 3 & 4 Will. 4, c. 87, ss. 2 and 4, that the original award, or a copy of the enrolment signed by the proper officer of the court or the clerk of the peace or his deputy, and purporting to be a true copy, shall be admitted in all courts as legal evidence. In any collateral proceeding in which it may be necessary to give it in evidence, it will be presumed that the award has been regularly made, and that the commissioners were duly qualified, and had given the proper notices, &c.: but this presumption may be rebutted; *R. v. Haslingfield*, 2 M. & S. 559; *Doe d. Nanney v. Gore*, 2 M. & W. 320; *acc. Williams v. Eyton*, 2 H. & N. 771; 27 L. J., Ex. 176; 4 H. & N. 357; 28 L. J., Ex. 146, Ex. Ch., and excess of authority may be shown; *Wingfield v. Tharp*, 10 B. & C. 785. Awards made under 6 & 7 Will. 4, c. 115, or 3 & 4 Vict. c. 31, are, by sect. 1 of the last act, made conclusive evidence of a compliance with all the provisions of those acts, and of all necessary consents, and no other evidence of title under the inclosure shall be requisite.

ORAL PROOF BY WITNESSES.

THE J. Act, 1875, s. 20, provides that "nothing in this act or in the first schedule hereto, or in any rules of court to be made under this act, save as far as relates to the power of the court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury or the rules of evidence, or the law relating to jurymen or juries." By Rules, 1883,

O. xxxvii. r. 1, "In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *viâ voce* and in open court," but the court or a judge may in certain cases allow depositions or affidavits to be used, *vide post*, p. 175, *et seq.*

Attendance of Witnesses.

Subpœna, service of.—Expenses.] The process to compel the attendance of witnesses is the writ of *subpœna ad testificandum*. *Edgell v. Curling*, 7 M. & Gr. 958. This writ will now, by stat. 17 & 18 Vict. c. 34, s. 1, issue out of the superior courts into any part of the United Kingdom on the special order of the court or judge. It is, however, provided by sects. 5 and 6, that this provision is not to affect the power of the court to issue commissions to examine, or to affect the admissibility of evidence heretofore admissible by reason of a witness being beyond the jurisdiction:—in other words, Scotland and Ireland are still, for these last-mentioned purposes, to be regarded as out of the jurisdiction of the superior courts of England. Either the writ, or a copy of it, must be personally served on the witness; and where a copy only is delivered, the original must be shown whether the witness require it or not; otherwise he cannot be attached. *Wadsworth v. Marshall*, 1 Cr. & M. 87. It must be served so as to give witnesses "reasonable time to put their own affairs in such order that their attendance may be with as little prejudice to themselves as possible." *Hammond v. Stewart*, 1 Stra. 510. But urgent domestic business is no excuse for disobedience. *Goff v. Mills*, 2 D. & L. 23. Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, is too short. *Ibid.* But where a person is present in or attending near the court, service on the day of trial may be sufficient under the circumstances. *Maunsell v. Ainsworth*, 8 Dowl. 869. Whether the service be sufficient is for the judge not the jury. *Barber v. Wood*, 2 M. & Rob. 172. If the cause be made a *remanet*, the *subpœna* must be re-sealed and re-served. *Sydenham v. Rand*, 3 Doug. 429. Though the writ only requires attendance on the commission day, the witness must attend for the whole assizes till the cause comes on. *Scholes v. Hilton*, 10 M. & W. 15.

A witness in a civil suit is not bound to attend unless the reasonable expenses of going to and returning from the place of trial, and of his stay there, are tendered to him at the time of serving the *subpœna*; nor, if he appears, is he bound to give evidence before such expenses are paid or tendered. *Chapman v. Paynton*, 13 East, 16, n. The reasonableness depends on the situation and circumstances of the witness; *Dixon v. Lee*, 1 C. M. & R. 645; *Vice v. Anson, Ly.*, M. & M. 96; and where a witness has already been paid by one side, this may be taken into account when he is *subpœnaed* by the other side. *Betteley v. M^r Leod*, 3 N. C. 405. Within the bills of mortality the usual tender is one shilling in a town cause. *Tidd*, Prac. 9th ed. 806. Where a witness has come to and stayed at the assizes on *subpœna* without requiring payment, he may refuse to appear till payment of the expense of returning. *Newton v. Harland*, 1 M. & Gr. 956. But no tender of compensation for loss of time is necessary, though it is the practice to allow it in costs in some cases. *Collins v. Godefroy*, 1 B. & Ad. 950. And a witness *subpœnaed* to give evidence on a matter of personal opinion or professional skill, and not to depose to the facts of the case, may insist on being paid compensation for loss of time before he is examined. *Webb v. Page*, 1 Car. & K. 23, *cor.* Maule, B.

A party who is a necessary or (*ut semb.*) a material witness in his own cause, and who attends the trial only for that reason, may be entitled to his expenses like any other witness; *Howes v. Barber*, 18 Q. B. 588; 21 L. J., Q. B. 254; *Dowdell v. Australian Mail Co.*, 3 E. & B. 902; 23 L. J., Q. B. 369; but if about to attend on his own account, he is not entitled to conduct money when subpœnæd by the other side. *Reed v. Fairless*, 3 F. & F. 958.

Before the jury are sworn, the counsel of the party may have an absent witness called on his subpœna. *Hopper v. Smith*, M. & M. 115. This course, when adopted by the plaintiff, avoids the additional expense of a nonsuit, if the judge will allow the plaintiff to withdraw the record under Rules, 1883, O. xxvi., r. 1. *Mullett v. Hunt*, 1 Cr. & M. 752. But it is not absolutely necessary to call a witness on his subpœna in order to entitle the party to proceed against him. *Lamont v. Crook*, 6 M. & W. 615; *Goff v. Mills*, 2 D. & L. 23.

By the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 6, a banker or officer of a bank is not, in any legal proceedings to which the bank is not a party, compellable to appear as a witness to prove the matters and accounts recorded in the banker's books, unless by order of a judge made for special cause. For definitions, see sect. 9, *ante*, pp. 116, 117.

Habeas corpus.] If the witness is in custody, his attendance must be produced by a writ of *habeas corpus ad testificandum*; or by warrant or order under 16 & 17 Vict. c. 30, *infra*. A judge may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in which he is confined under civil process, for the purpose of giving evidence at the trial. Tidd, Prac. 9th ed. 809. A *habeas corpus* also lies to bring a witness from a lunatic asylum, on an affidavit that he is fit for examination and not dangerous. *Fennell v. Tait*, 1 C. M. & R. 584. By 16 & 17 Vict. c. 30, s. 9, a secretary of state or a judge may issue a warrant or order to bring up any prisoner, not confined on civil process, to be examined as a witness, and this shall have the same effect as a *hab. corp. ad test.*

Protection from arrest.] During the time consumed by a witness in going to the place of trial, in his attendance there, and in his return, he is protected from arrest on civil process; even though he has consented to attend without a subpœna. *Arding v. Flower*, 8 T. R. 536. As to what is civil process against a solicitor, see *In re Freston*, 11 Q. B. D. 545, C. A., and *In re Dudley*, 12 Q. B. D. 44, C. A.

Absence of material witness.] In some cases an application on affidavit may be made to put off the trial on account of the absence of a material witness. An application to put off the trial beyond the existing sittings, or from sittings to sittings, was not generally allowed on the part of the plaintiff; because he might at any time withdraw the record if he was not prepared to try. *Per* Ld. Ellenborough, *Ansley v. Birch*, 3 Camp. 333. As now, however, by Rules, 1883, O. xxvi., r. 1, a plaintiff cannot withdraw the record without the leave of the court or a judge, this reason to some extent fails, and these applications on the part of plaintiffs will probably be more frequent than they have hitherto been. And where, from the sudden indisposition of a witness who might be able to attend in the course of a day or two, or for other temporary reason, the plaintiff was prevented from trying his cause in its order in the paper, yet had ground to believe he should be able to try it before the sittings were over, a judge at *Nisi Prius* would make an order for the trial to stand over till the witness was likely to attend. And a similar order was made if it appeared that the absence of the witness was owing to the conduct of the defendant's attorney. *Turquand v. Dawson*, 1 C. M. & R. 709. When a motion is about to be made to a judge at *Nisi Prius* for putting off the trial on account of the

absence of a witness, notice should first be given to the opposite solicitor, with a copy of the affidavit intended to be used in support thereof. Where expenses have been incurred by the other party in bringing up witnesses, the application will only be granted on the terms of paying them. No affidavit of merits is required. *Att.-Gen. v. Hull*, 2 Dowl. 111; *Hill v. Prosser*, 3 Dowl. 704. The affidavit may be made by the party, or by his solicitor; *Duberly v. Gunning*, Peake, 97; or by the solicitor's clerk, if he has the management of the cause; *Sullivan v. Magill*, 1 H. Bl. 637. A common form of affidavit for this purpose will be found in the APPENDIX.

Production of documents under subpœnâ duces tecum.] A witness served with a *subpœnâ duces* is bound to bring into court any document proved to be in his possession, though he may have a valid excuse for not showing it in evidence; and the validity of the excuse is matter for the judgment of the court, and not of the witness. *Amey v. Long*, 9 East, 473.

The court will excuse production if the disclosure would subject the party to a criminal charge or penalty; *Whitaker v. Izod*, 2 Taunt. 115; but not unless the party from whom disclosure is sought will pledge his oath that to the best of his belief the production would tend to criminate him. *Webb v. East*, 5 Ex. D. 108, C. A. It seems, however, that production will never be enforced in an action for penalties. *Hummings v. Williamson*, 10 Q. B. D. 459, 462. With these exceptions, no document relevant to the issue, nor being a title deed (as to which *vide infra*), is privileged from disclosure, unless it be a confidential communication professionally made between counsel or solicitor and client, or information obtained by the solicitor, or an agent employed by him or by the client on his recommendation. *Bustros v. White*, 1 Q. B. D. 423, C. A.; *Anderson v. Bank of British Columbia*, 2 Ch. D. 664, C. A.; *McCorquodale v. Bell*, 1 C. P. D. 471; *Friend v. L. Chatham & Dover Ry. Co.*, 2 Ex. D. 437, C. A. See also *Bullock v. Corrie*, 3 Q. B. D. 356; *Nordon v. Defries*, 8 Q. B. D. 508; and *The Palermo*, 9 P. D. 6, C. A. Or information obtained by the client for the purpose of obtaining the opinion of the solicitor thereon, and although the purpose was not carried out. *Southwark & Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315, C. A. Confidential communications between solicitor and client are privileged though made before any litigation was in contemplation; *Minet v. Morgan*, *infra*; but communications obtained by the solicitor from third persons are not privileged unless prepared confidentially after a dispute had arisen, for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties. *Wheeler v. La Marchant*, 17 Ch. D. 675, C. A. See further *post*, pp. 159, *et seq.*

A party will not be compelled to produce his title deeds. *Pickering v. Noyes*, 1 B. & C. 263. But he must pledge his oath that they do not to the best of his belief contain anything impeaching his case or material to the case of the other party, or the deeds will not be privileged. *Minet v. Morgan*, L. R., 8 Ch. 361. A solicitor will not be compelled to produce his client's title-deed. *Harris v. Hill*, 3 Stark. 140. So a defendant cannot compel the production of deeds of the plaintiff by serving a subpoena on his steward in whose possession they are; for his possession is that of his employer; *Falmouth, El. of, v. Moss*, 11 Price, 455; and see *Crowther v. Appleby*, L. R., 9 C. P. 23; nor can a clerk in a public office be compelled to bring official papers without leave of the principal; *Austin v. Evans*, 2 M. & Gr. 430. An attorney was not obliged by subpoena to disclose a deed of the defendant, his client, though he had been improperly compelled by commissioners of bankrupt (under whom the plaintiff claimed) to undertake to produce it; *Nixon v. Mayoh*, 1 M. & Rob. 76. The attorney and steward of the lord of

a borough was held bound to produce certain presentments and precepts touching the appointment of officers in the borough, as being of a public nature. *R. v. Woodley*, 1 M. & Rob. 390. In an action by a reversioner to recover the land, the executor of the previous tenant for life is bound to produce a steward's book of his testator showing receipt of rent for the land, in order to prove the plaintiff's title; and it is immaterial that the witness is interested in defeating the action. *Doe d. El. of Egremont v. Date*, 3 Q. B. 609. A mortgagor could not, after the mortgage had become absolute, compel the production, by the mortgagee, of the title deeds of the mortgaged property, without payment of principal, interest, and costs. *Chichester, El. of, v. Donegall, Ms. of, L. R.*, 5 Ch. 497. But this rule would seem now to be altered as to mortgages made after 31st December, 1881, by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 16, which entitles a mortgagor to inspect and make copies of the deeds, so long as his right to redeem exists.

Where the witness declines to produce an instrument on the ground of professional confidence, the judge should not inspect it to see whether it was one which he ought to withhold; *Doe d. Carter v. James*, 2 M. & Rob. 47; *Volant v. Soyer*, 13 C. B. 231; 22 L. J., C. P. 83; and it seems that the mere assertion on oath by the solicitor that it is a title-deed or other privileged document, is conclusive. S. C. And if the document is brought into court by a witness, who says that he is instructed by the owner to object to the production of it, this is enough to justify secondary proof without subpoenaing the owner himself to make the objection in person. *Phelps v. Prew*, 3 E. & B. 430; 23 L. J., Q. B. 140. It seems to be sufficient if one only of several interested parties object. *Per Maule, J., Newton v. Chaplin*, 19 L. J., C. P. 374. See also *Kearsley v. Philips*, 10 Q. B. D. 465, C. A. When the production is excused, secondary evidence is admissible. *Marston v. Downes*, 1 Ad. & E. 31; *Doe d. Gilbert v. Ross*, 7 M. & W. 102. An attorney who was allowed to withhold a title-deed of his client, was obliged to show another witness, who produced a copy of a deed which he believed to be the deed withheld, the indorsement on the outside of the original, so as to enable him to identify it with the one copied. *Phelps v. Prew, supra*. If the solicitor produce his client's deed without objection, the evidence is admissible; see *Hibberd v. Knight*, 2 Exch. 11. And the verdict will not, it seems, be endangered by the reception of it; for it is the privilege of the witness, and not of the party in the action, to withhold it. *Phelps v. Prew, supra*. The witness is not entitled to have his liability to produce argued by counsel. *Doe d. Rowcliffe v. Egremont, El. of*, 2 M. & Rob. 386.

A person merely subpoenaed to produce, and not to testify, need not be sworn. *Perry v. Gibson*, 1 Ad. & E. 48. And if sworn by mistake, he is not liable to cross-examination. *Rush v. Smith*, 1 C. M. & R. 94.

By Rules, 1883, O. lxi. r. 28, "no affidavit or record of the court shall be taken out of the central office without the order of a judge or master, and no subpoena for the production of any such document shall be issued." Nor in any action to which the bank is not a party, can a banker, except by judge's order, be compelled to produce any of his books the contents of which can be proved under the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), *ante*, p. 116; sect. 6.

EXAMINATION OF WITNESSES.

Ordering witnesses out of court.] During a trial the court will, on the application of either of the parties, order all the witnesses in the cause,

except the one under examination, to go out of court. But if the solicitor in the cause is a witness, he will, in general, be suffered to remain, his assistance being necessary to the proper conduct of the cause. *Pomeroy v. Baddeley*, Ry. & M. 430. This, however, is a matter entirely for the discretion of the judge. If the witness remains after being ordered to withdraw, it will not necessarily prevent his being examined; *Parker v. M'William*, 6 Bing. 683; *R. v. Colley*, M. & M. 329; and the better opinion is that, although the witness may be fined for disobedience, the judge cannot refuse to hear him under such circumstances; *Chandler v. Horne*, 2 M. & Rob. 423; *Cobbett v. Hudson*, 1 E. & B. 14; except in Exchequer causes, where the witness is peremptorily excluded on trials between the Crown and a subject; *Att.-Gen. v. Bulpit*, 9 Price, 4; *Parker v. M'William*, *supra*. It is not the practice to order either of the parties out of court so long as their conduct there is unobjectionable. *Charnock v. Dewings*, 3 Car. & K. 378. But as a party can now be a witness, as such he is perhaps liable to be ordered out of court. See *Outram v. Outram*, W. N. 1877, p. 75, M. V.-C. As, however, a party may conduct his own cause in court, examine his witnesses, and give evidence as one himself; *Cobbett v. Hudson*, 1 E. & B. 11; 22 L. J., Q. B. 11; it follows that the party in such a case has a right to remain in court.

Oath of witness.] By the common law of England every witness must be sworn according to some religious ceremony or other, and if it be dispensed with, it can only be by the authority of an Act of Parliament. *Medan v. Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118, *per* Pollock, C. B. There is, however, no prescribed form of oath; it is to be that which the witness himself declares to be binding upon his conscience, and he is always allowed to adopt the ceremonies of his own religion. Phill. Ev., 9th ed., p. 9; *Omichund v. Barker*, Willes, 547; 1 Smith's Lead. Cas.; *Atcheson v. Everitt*, Cowp. 382; *Miller v. Salomons*, 7 Exch. 534, 558; 21 L. J., Ex. 186, 196, *per* Alderson, B., and Pollock, C. B.

The usual ceremony of swearing a Christian witness is as follows: He takes a copy of the New Testament into his naked right hand, and the officer of the court whose duty it is to administer the oath addresses him thus: "The evidence which you shall give between the parties shall be the truth, the whole truth, and nothing but the truth, so help you God;" and the witness then kisses the book.

A Jew is sworn upon the Pentateuch, with his head covered. 2 Hale P. C. 279; *Omichund v. Barker*, Willes, 543. But a Jew who stated that he professed Christianity, but had never been baptized, nor had even formally renounced the Jewish faith, was allowed to be sworn on the New Testament. *R. v. Gilham*, 1 Esp. 285. A witness who stated that he believed both the Old and New Testament to be the word of God, yet, as the latter prohibited, and the former countenanced, swearing, he wished to be sworn on the former, was permitted to be so sworn. *Edmonds v. Rowe*, Ry. & M. 77. So, where a witness refused to be sworn in the usual form by taking the book in his right hand and afterwards kissing it, but desired to be sworn by having the book laid open before him and holding up his right hand, he was sworn accordingly. *Dalton v. Colt*, 2 Sid. 6; Willes, 553. And where, on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hands to his buttons, and in reply to a question whether he was sworn, stated that he was sworn and was under oath, it was held sufficient. *R. v. Love*, 5 How. St. Tr. 113. A Scotch witness has been allowed to be sworn by holding up the hand, without touching the book or kissing it, and the form of the oath adminis-

tered was: "You swear according to the custom of your country and of the religion you profess, that the evidence," &c., &c. *R. v. Mildrons*, 1 Leach, C. C. 412; *R. v. Walker*, *Id.* 498; *Mee v. Reid*, Peake, 23. *Ld. George Gorton*, before he turned Jew, was sworn in the same manner, upon exhibiting articles of the peace in the King's Bench. MS.; M'Nally Ev. 97. The following is also given as the form of a Scotch Covenanter's oath: "I, A. B., do swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give to the court and jury touching the matter in question is the truth, &c. So help me God." 1 Leach, C. C. 412, n. In Ireland it is the practice to swear Roman Catholic witnesses upon a New Testament with a crucifix or cross on it. MS.; M'Nally Ev. 97. A Mahomedan is sworn on the Koran. The form in *R. v. Morgan*, 1 Leach, C. C. 54, was as follows: The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo has been received, who touched with his hand the foot of a Brahmin. *Omichund v. Barker*, 1 Atk. 21. The following is given in one case as the form of swearing a Chinaman. On entering the box the witness immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The officer of the court then, through an interpreter, addressed him thus: "You shall tell the truth, and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." *R. v. Entrehman*, 1 Car. & M. 248. If the witness does not understand the English language he must of course be addressed through an interpreter.

By stat. 1 & 2 Vict. c. 105, s. 1, "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, . . . or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding."

A witness may be asked whether he considers the form of administering the oath to be such as will be binding on his conscience. The proper time for asking him this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel, is directed to it, the objection is not, in such a case, to be precluded; but the witness may nevertheless be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding upon his conscience. *The Queen's Case*, 2 B. & B. 284. So, where a Jew was sworn on the Gospels as a Christian, it was held that the oath, as taken, was binding on the witness, both as a religious and moral obligation. *Sells v. Hoare*, 3 B. & B. 232; S. C., 7 B. Moore, 36.

Affirmation in lieu of oath.] Formerly it was considered necessary, in all cases, that an oath, that is, a direct appeal to a divine power, should be made by the witness. Numerous sects have, however, arisen, the members of which allege conscientious objections to take an oath. In order to prevent the difficulty which arose from large classes of the community being thus rendered unavailable as witnesses, various statutes have, from time to time, been passed, exempting such persons from the necessity of

taking an oath, and allowing them to substitute a solemn affirmation in its stead. Thus, by the 3 & 4 Will. 4, c. 49, s. 1 (extending the provisions of 9 Geo. 4, c. 32, s. 1), Quakers and Moravians are permitted, whenever an oath is required, instead of taking an oath, to make an affirmation or declaration in the words following :—"I, A. B., being one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*), do solemnly, sincerely, and truly declare and affirm."

Where a prosecutor who had been a Quaker, but had seceded from the sect, and called himself an Evangelical Friend, stated that he could not affirm in the above form, and he was allowed to give evidence under a general form of affirmation, his evidence was held to have been improperly received. *R. v. Doran*, 2 Mood. C. C. 37. The law was, however, at once altered by the 1 & 2 Vict. c. 77, which enacts that "it shall be lawful for any person who shall have been a Quaker or a Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form;" and shall be in the words following :—"I, A. B., having been one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*), and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

By stat. 3 & 4 Will. 4, c. 82, the sect of dissenters called Separatists are allowed in lieu of an oath, to make an affirmation or declaration, in the words following :—"I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare."

Since the above acts it has been provided generally by the C. L. P. Act, 1854, s. 20, that, "if any person called as a witness, or required, or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; videlicet,—'I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare,' &c.; which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form."

Promise and declaration in lieu of oath.] Until recently, persons who from defective education did not understand the religious obligation of an oath, and also persons who did not acknowledge an absolute divine power, or acknowledging such a power did not believe it would punish perjury, were equally incapable of giving evidence; but all objections on these grounds have been removed by the following statutes, and for the old law on this head it suffices to refer to the leading case of *Omichund v. Barker*, Willes, 538, and the notes thereto in 1 Smith's Lead. Cases.

The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), by sect. 4 enacts, that "If any person called to give evidence in any court of

justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth."

The words "court of justice" and the words "presiding judge" in this section were by the Evidence Amendment Act, 1870 (33 & 34 Vict. c. 49), s. 1, extended so as "to include any person or persons having by law authority to administer an oath for the taking of evidence." As to the object of this extension, see *Bradlaugh v. De Rin*, W. N. 1870, p. 9, C. P., H. T.

These enactments seem to apply equally, whether the incompetency of the witness to take an oath arises from defect of education or perversion of intellect.

Incompetency.] The objection to witnesses on the ground of incompetency has been very much narrowed by recent enactments, and now all persons whose mental power of distinguishing and relating the truth can be relied on are competent, though not always compellable, witnesses.

As to the former objection to witnesses who were ignorant of or did not acknowledge the religious obligation of an oath, *vide supra*.

As to the objection on the ground of interest, *vide post*, pp. 152, *et seq.*

The objection on the ground of defective understanding still remains, and this objection, and how and when it is to be decided, we will now consider.

Incompetency from defective understanding.] A person whose understanding is manifestly and egregiously defective will not be allowed to give evidence. This defect may arise from immaturity of intellect, or some species of insanity. Such a witness would not be competent, because his mental power of distinguishing and relating the truth could not be relied on.

As a general rule insane persons, idiots and lunatics, during their lunacy, are incompetent witnesses. But lunatics in their lucid intervals are competent. Com. Dig. Testm.—Witness (A. 1). It may be observed that here the question of competency will always turn solely on whether or no the witness will be likely to give truthful evidence, and if he is likely to do this he may be received, notwithstanding considerable defects of intellect, or even aberration of mind on certain subjects. *R. v. Hill*, 2 Den. C. C. 254; 20 L. J., M. C. 222. It makes no difference, whether the defect of understanding arises from imperfect education, from natural imbecility, or from failure of the mental powers. It is for the judge by examination of the lunatic on the *voir dire*, and of witnesses called for that purpose, to ascertain and decide on his competency, and if the judge allow him to give evidence the jury must decide on the credit to be attached to his testimony. *S. C. Id.*, following *R. v. Anon.*, cited *per Parke, B.*, in *Att.-Gen. v. Hitchcock*, 1 Exch. 95.

Deaf and dumb persons were formerly presumed to have understandings so defective as to be in all cases incompetent; a presumption entirely contrary to experience, and one not likely now to be made. See *Harrod v. Harrod*, 1 K. & J. 9. The state of the intellect of such a witness might, of course, be reasonably inquired into before taking his testimony, as, the usual channels of information being cut off, the education of such persons is more than usually difficult. See 2 Taylor, Evid. § 1241. A deaf and dumb person may give evidence through an interpreter by signs; *Ruston's case*, 1 Leach,

C. C., 4th ed., 408 : or by writing. *Per Best, C. J., Morrison v. Lennard*, 3 C. & P. 127. Where such a person has been examined on the *voir dire*, and pronounced to be a competent witness, and it afterwards appears during the examination in chief that the witness is incompetent, his evidence may be withdrawn from the jury. *R. v. Whitehead*, L. R., 1 C. C. 33.

Children not able to apprehend the obligation of an oath or promise cannot be examined ; *Com. Dig. supra* ; B. N. P. 293 ; but tender age alone is no objection. *Brazier's Case*, 1 East, P. C. 443. And a child who was wholly destitute of religious education has been allowed to be made a competent witness by being taught the nature of an oath before the trial, with a view to qualify him ; *R. v. Murphy*, 1 Leach, 4th ed., 430, n. ; the ruling of Patteson, J., in *R. v. Williams*, 7 C. & P. 320, is too broadly expressed, though in that case the child was rightly rejected. The objection of the absence of religious knowledge as to the binding effect of an oath, seems now to be removed by 32 & 33 Vict. c. 68, s. 4, *ante*, pp. 150, 151, as under that section the child may make a promise and declaration. Where a child is tendered as a witness, the practice in criminal cases is for the judge to examine him with a view to ascertain his competency, *vide ante*, p. 151. Where the child cannot be admitted to give evidence, an account of the transaction which it has given to others is, of course, inadmissible. *R. v. Tucker*, 1 Phill. Ev., 10th ed., 10.

It is evident that in any of the above cases if a witness who has been examined by the same judge on the *voir dire*, and pronounced competent, should afterwards manifestly appear to him to be in such a mental condition as to be incompetent to give evidence, the evidence must be withdrawn from the jury : *vide R. v. Whitehead, supra*. The earlier cases on the question of when counsel must take the objection of the incompetency of a witness were almost all cases where the objection was founded on interest in the subject-matter of the action, and hardly apply to the case of defect of intellect.

Incompetency on the ground of interest.] Formerly all persons having an interest in the suit were on that ground disqualified, as were also their husbands and wives ; but these disqualifications have been entirely abolished, although with regard to certain matters the witness may refuse to give evidence, and in one case the uncorroborated evidence of the plaintiff will not suffice to obtain a verdict.

The following are the statutory provisions on this subject :—

By the stat. 3 & 4 Will. 4, c. 42, s. 26, it was enacted that in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent, on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined ; but in that case the verdict or judgment should not be admissible for or against him, or any one claiming under him.

The greater changes introduced by the subsequent acts have rendered it useless to retain the cases decided under this act.

By the 6 & 7 Vict. c. 85, s. 1, it is provided "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence ; but that every person so offered may and shall be admitted to give evidence on oath or solemn affir-

mation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or injury" (*sic*; *qy.* inquiry?), "or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence."

This section contained a provision that it should not render the actual parties to the suit, or any person for whose immediate benefit the action was brought or defended, or the husband or wife of any such person, competent as witnesses. This exception was, as regards the parties themselves, and those for whose immediate benefit the action was brought or defended, repealed by the 14 & 15 Vict. c. 99, s. 1, and by sect. 2 the parties are rendered competent; except in any proceeding "instituted in consequence of adultery, or to any action for breach of promise of marriage," sect. 4. Sect. 3 provides that nothing therein contained "shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

It was held under sect. 4, that a co-respondent in a divorce suit was not a competent witness so long as he remained a party to the record. *Robinson v. Robinson*, 1 Sw. & Tr. 382; 27 L. J., P. M. & A. 91. See *Blackborne v. Blackborne*, *post*, p. 154.

Shortly after the passing of this act it was decided that sects. 1 and 2 did not have the effect of making a husband or wife competent or compellable to give evidence for or against the wife or husband in civil cases, except where the wife was a party to the record. *Barbat v. Allen*, 7 Exch. 609; 21 L. J., Ex. 155; *Stapleton v. Croft*, 18 Q. B. 367; 21 L. J., Q. B. 247.

But now, by the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 1, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *visd voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

By sect. 2, "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery."

By sect. 3, "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." See cases hereon, *post*, p. 159.

Under this act the wife may prove her own adultery in an action against her husband for goods supplied to her. *Cooper v. Lloyd*, 6 C. B., N. S. 519. As to proof of non-access, see *post*, tit. *Action for recovery of possession of land by heir.—Proof of Illegitimacy.*

As in a suit instituted by the wife for the dissolution of her marriage by reason of her husband's adultery coupled with wilful desertion, she was not, by reason of the exceptions in the above acts, a competent witness to prove the desertion (*Pyne v. Pyne*, 1 Sw. & Tr. 178; 27 L. J., P. M. & A. 54), it

was enacted by the 22 & 23 Vict. c. 61, s. 6, that on any petition presented by a wife in the Divorce Court for dissolution of marriage "by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

Where the suit was by the husband against his wife on the ground of her adultery, and the wife in her answer alleged the cruelty and desertion of the petitioner, the evidence of the parties was excluded; *Whittal v. Whittal*, 30 L. J., P. M. & A. 43; even though the wife in her answer prayed relief under 29 & 30 Vict. c. 32, s. 2. *Bland v. Bland*, L. R., 1 P. & M. 513. If, however, the suit were instituted by the husband for the restitution of conjugal rights, and the wife in her answer alleged the husband's adultery, and prayed for a judicial separation, she was a competent witness. *Blackborne v. Blackborne*, *Id.* 563.

The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 1, repeals the 14 & 15 Vict. c. 99, s. 4, and so much of 16 & 17 Vict. c. 83, s. 2, as is contained in the words "or in any proceeding instituted in consequence of adultery;" *vide ante*, p. 153; and by sect. 3, "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

By sect. 2, "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

It seems that "any proceeding in consequence of adultery" in sect. 3, includes only proceedings for divorce or judicial separation. *Nottingham, Guardians of, v. Tomkinson*, 4 C. P. D. 343.

It will be observed that sect. 3 enables a person when called as a witness in such a cause, whether a party thereto or not, to refrain altogether from giving any evidence that may tend to show that he or she has been guilty of adultery; but the section does not exclude the evidence of the witness if he be willing to give it. *Hebblethwaite v. Hebblethwaite*, L. R., 2 P. & M. 29. The exemption extends to adultery of the witness, committed at any time, and is not confined to the adultery in respect of which the proceedings were instituted. *Babbage v. Babbage*, *Id.* 222. If, however, the party deny the truth of some of the charges of adultery contained in the pleadings, and is asked no questions as to others, he is bound to answer questions in cross-examination respecting all the charges in the pleadings. *Brown v. Brown*, L. R., 3 P. & M. 198.

Under sect. 2, it has been held that evidence that the plaintiff said to the defendant that he had promised to marry her, and that the defendant did not deny it, was sufficient material evidence. *Bessela v. Stern*, 2 C. P. D. 265, C. A.

[*Incompetency from infamy.*] This head of disqualification has been reduced within very narrow limits if not entirely abolished by 6 & 7 Vict. c. 85, s. 1, *ante*, p. 152. Before the passing of that act conviction and judgment for felony, or any species of *crimen falsi*, rendered the party incompetent as a

witness unless the competency were restored by a pardon, or by having undergone the punishment assigned to the offence. Whether the act extends to the case of outlawry for felony is, perhaps, open to question. See 3 Inst. 212.

The offence and conviction may still be proved by the admission of the witness or otherwise, as before, for the purpose of impugning his credit. *R. v. Castell Carcinion*, 8 East, 78. *Vide post*, p. 173.

Judges, jurors, arbitrators, counsel, &c.] A person, whose name is in the commission of assize, may be examined as a witness; so may a juror. Bac. Abr. Evid. A. 2.

In an action to enforce his award, the arbitrator may be called as a witness to prove what passed before him, what matters were presented for his consideration, and what claims admitted; but he cannot be asked as to what passed in his own mind when exercising his discretionary power on the matters submitted to him, nor can he be asked questions to explain, aid, or contradict his award. *Bucclough, Dk. of, v. Metropolitan Board of Works*, L. R., 5 H. L. 418.

Counsel and solicitors in the cause may also be witnesses in it (subject to the rule respecting privileged communications, mentioned *post*, p. 159, *et seq.*); but the practice is open to objection, and such evidence should, if possible, be dispensed with. Bac. Abr. Evid. (A. 3). See also Best on Evid., § 184.

Inference from not calling the party.] Since parties have been made competent witnesses, it has been a common practice to comment on their absence as witnesses, and to make observations on it as a suspicious suppression of unfavourable testimony. There seems to be no legitimate objection to such comments; and where a party is present in court, and testimony has been given which he must be able, if untrue, to contradict, and is interested in doing so, great weight will naturally be given to such comments. But the mere fact of his not being offered as a witness is not, *per se*, evidence against him, though it may turn the scale if his absence is unexplained and there is other slight evidence or some ambiguous admission by him out of court. See *M'Keven v. Cotching*, 27 L. J., Ex. 41. The case bears some resemblance to that of admissions implied from a tacit acquiescence in statements made in the party's presence. See *ante*, p. 62.

Examination in chief.] On almost every trial a great deal of discussion arises as to putting leading questions. Leading questions are those which, from the form in which they are put, are likely to communicate to the witness a knowledge of what answer would be favourable to the person putting it; which would of course be dangerous with a dishonest witness. In some cases of critical inquiries also, it is very desirable to get the witness's own impression, which the most veracious witness might not, after another view had been once suggested to him, be able to recall.

The objections, therefore, to leading questions apply by no means with equal force to all witnesses and to all parts of an inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover, innumerable questions are put for a mere formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry.

As a great saving of time is effected by leading a witness, it would be extremely undesirable to stop it, where it is otherwise unobjectionable.

There is no distinction recognised by the law between questions which are and questions which are not leading. To object to a question as leading is only a mode of saying that the examination is being conducted unfairly. It is entirely a question for the presiding judge to say, in his discretion, whether or not the examination is being conducted fairly.

It is sometimes said that all questions capable of being answered by merely *yes* or *no*, are objectionable as leading. But this is a very fallacious test, even in the most critical parts of an inquiry. On the other hand, it is sometimes said that the objection that the question is leading may be got over by putting it in the alternative; but it is obvious that nothing would be easier than to suggest in this way a whole conversation to a dishonest witness.

A witness, produced to read or explain a series of ancient records brought into court, may be asked to state the result of them; and this is permitted for saving of time, and because the witness can be interrogated as to the particular entries on which he founds his general statement of their purport and effect, and may be called upon to point them out to the court. *Rowe v. Brenton*, 3 M. & Ry. 212.

It has been already shown (*ante*, pp. 1, 4, *et seq.*) that oral proof of a written document cannot be admitted on examination in chief, unless a proper foundation for it be laid by accounting for the non-production of the writing itself; and that where any agreement, communication or statement is the subject of inquiry, the opposite party may interpose the question—whether it was in writing? The circumstances and conditions under which oral evidence of written documents may be admitted are also explained, p. 4, *et seq.*, *Secondary Evidence*.

Where a witness for the plaintiff, cross-examined as to the contents of a lost letter, swore that it did not contain a certain passage, and a witness was called by the defendant to contradict this statement, *Ld. Ellenborough* ruled that he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side; for otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Camp. 43. And where, in cross-examination, a witness being asked as to some expressions which he had used denied them, and the counsel on the other side called a person to prove that the witness had used such expressions, and read to him the particular words from his brief, *Abbott, C. J.*, held that he was entitled to do so; *Edmonds v. Walter*, 3 Stark. 7; and this is now the common practice. But where a witness denied, on cross-examination, the use of certain expressions by him in a conversation at which both plaintiff and defendant were present, it was held that a witness, called to prove that such expressions were used, could not have the very words suggested to him; the conversation being evidence in itself, and not proved for the mere purpose of discrediting the witness. *Hallett v. Cousens*, 2 M. & Rob. 238.

If a witness when called displays a determination to speak as unfavourably as possible to the party calling him, or as it is sometimes called, proves hostile, then the party calling him may conduct the examination with the same latitude as we shall hereafter see a cross-examination may be conducted (*post*, pp. 167, 168); see *Coles v. Coles*, L. R., 1 P. & M. 70; but he must confine himself to matters material to the issue. The party calling a witness cannot cross-examine him merely to test his credit, as his opponent may; *vide post*, p. 171. It has been ruled that if a witness stands in a situation which of necessity makes him adverse to the party calling him, the counsel may as matter of right cross-examine him. *Clarke v. Saffery*, Ry. & M. 126. The presiding judge has a discretion as to the

mode of examination in order best to answer the purposes of justice. *Per Abbott, C. J., Bastin v. Carew, Id.* 127.

When a question is propounded, the opposite party may object that it is one which transgresses the rules of evidence. If not objected to, or if the objection be overruled, the witness must answer it, unless he can show that he has some privilege which enables him to refuse to do so. If he refuse to answer the question, and can show no privilege, he will be liable to be fined and imprisoned by the court. *Ex pte. Fernandez*, 10 C. B., N. S. 11; 30 L. J., C. P. 321.

Privilege.] There are some questions which a witness is not compellable to answer, though, if he choose to answer them, his evidence is to be received. The following are such cases :—

When a witness is privileged on the ground of injurious consequences of a civil kind.] A witness is privileged from answering any question, the answer to which might directly subject him to forfeiture of estate. See *Pye v. Butterfield*, 5 B. & S. 829; 34 L. J., Q. B. 17. But it seems that where property is granted to a person subject to a conditional limitation over, that person may be compelled to state whether the condition on which the estate goes over has not been fulfilled. *Per Cur. Id.* And by stat. 46 Geo. 3, c. 37, “a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons.”

It will be seen that this statute recognises the privilege, when the witness is exposed to a penalty or forfeiture. “Forfeiture” in this statute does not apply to a person in possession of property and become liable to forfeit it by reason of a breach of covenant. *Per Cockburn, C. J., in Pye v. Butterfield, supra.* A doubt might arise whether this exception extends to penalties to be recovered by a common informer or otherwise in a civil manner.

When a witness is privileged on the ground of injurious consequences of an ecclesiastical kind.] It has generally been considered that a witness may decline answering questions, the answering of which would expose him to ecclesiastical penalties; as on a proceeding under the 2 & 3 Edw. 6, c. 13, s. 2, for not setting out tithes; *Jackson v. Benson*, 1 Y. & J. 32; or for simony, *Brownwood v. Edwards*, 2 Ves. Sen. 245; or incest, *Chetwynd v. Lindon, Id.* 450. But a judge, in deciding whether or no the witness is entitled to the privilege, would no doubt consider how far the danger suggested by the witness was real; *R. v. Boyes, post*, p. 158; and the mere chance of an obsolete jurisdiction being set in motion would probably not be considered a sufficient ground for refusing to answer.

With regard to questions tending to show that a witness called in proceedings instituted in consequence of adultery has been guilty of adultery, see 32 & 33 Vict. c. 68, s. 3, *ante*, p. 154.

When a witness is privileged on the ground of injurious consequences of a criminal kind.] That the witness may by answering be subjected to a criminal charge, however that charge may be capable of being prosecuted, is clearly a sufficient ground for refusing to answer. Thus a person could

not be compelled to confess himself the father of a bastard child, so long as he was thereby subjected to the punishment inflicted by the 18 Eliz. c. 3, s. 2. *R. v. S. Mary, Nottingham*, 13 East, 57, n. So a witness could not be compelled to answer a question which subjected him to the criminal charge of usury. *Cates v. Hardacre*, 3 Taunt. 424. But if the time for the recovery of the penalty had expired, the witness might be compelled to answer. *Roberts v. Allatt*, M. & M. 192.

The witness is compellable to answer when he has received, before or at the trial, a pardon under the great seal for the offence of which he fears to criminate himself. *R. v. Boyes*, 1 B. & S. 311; 30 L. J., Q. B. 301. In this case the court overruled the objection that the pardon was not, by reason of stat. 12 & 13 Will. 3, c. 2, s. 3, pleadable to an impeachment by the House of Commons, because the danger to be apprehended must be real and appreciable, and an impeachment was, under the circumstances, too improbable a contingency to justify the witness in still refusing to answer on that ground.

Although the witness is not bound to answer questions of this nature, yet the question may be put, at least such appears on the whole to be the weight of authority. *The Queen's case*, 2 B. & B. 311; *R. v. Watson*, 2 Stark. 153. See *contra*, *Cundell v. Pratt*, M. & M. 108. With regard to questions tending only to criminate, it was said by Ld. Eldon, that it was the strong inclination of his mind to protect the party, not only against any question that has a direct tendency to criminate him, but against one that forms a step towards it. *Paxton v. Douglas*, 19 Ves. 227; *Claridge v. Hore* 14 Ves. 59; *Swift v. Swift*, 4 Hagg. Ecc. 154.

The objection is sometimes obviated by the express provision of the statute creating the offence, e.g. 24 & 25 Vict. c. 96, s. 85, as to fraudulent bailees, &c.; 38 & 39 Vict. c. 87, s. 103, as to fraudulent statements, &c., to obtain entry of land on register.

Right to decline answering—how decided.] It is now settled, after somewhat conflicting expressions of opinion, "that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself the effect of any particular question." *R. v. Boyes*, 1 B. & S. 311; 30 L. J., Q. B. 301. *Accord.*, *Ex pte. Reynolds*, 20 Ch. D. 294, C. A., where the earlier cases are collected and considered.

Thus the judge is to use his discretion, whether he will grant the privilege upon the bare claim of the witness, or whether he will investigate the claim by further inquiry. Of course, the witness must always pledge his oath that he believes the answer to the question will tend to criminate him, and if he assigns a reason which in the opinion of the court will not criminate him, he is not privileged. See *Scott v. Miller*, John. 220; 28 L. J. Ch. 584; *Ex pte. Aston*, 4 De G. & J. 320; 28 L. J., Ch. 631.

Counsel interested in excluding the evidence will not be allowed to argue in support of the objection. *R. v. Adey*, 1 M. & Rob. 94. A witness is not compellable to answer questions put for the mere purpose of degrading his character; *Cook's case*, 13 How. St. Tr. 334; *Freind's case*, *Id.* 17; *Layser's case*, 16 How. St. Tr. 161; though such questions may legally be asked. *R. v. Edwards*, 4 T. R. 440; *R. v. Holding*, Arch. Cr. Law, 102; *Cundell v. Pratt*, M. & M. 108. See the cases collected, 1 Phill. Ev. 269. If the witness choose to answer, his answer is generally conclusive. *R. v.*

Watson, 2 Stark. 149. *Vide Evidence of character, post*, pp. 172, 173, for those cases in which it is not conclusive.

Privilege of husband and wife.] In civil proceedings a question is sometimes put to a husband the answering of which would tend to criminate his wife, or to a wife the answering of which would tend to criminate her husband. There has been some confusion here between incompetency and privilege, and it was at one time thought that a husband or wife was in every case an incompetent witness with respect to any fact which might have a tendency to criminate the other; *R. v. Cliviger*, 2 T. R. 268; but that decision is no longer law; all the subsequent cases, with one exception, treating the husband and wife, except on an indictment against either, as competent witnesses. *R. v. All Saints, Worcester*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 647; *R. v. Williams*, 8 C. & P. 284. The case the other way is that of *R. v. Glead*, 3 Russ. on Crimes, 4th ed. 631, in which, on a charge of stealing wheat, Taunton, J., after consulting Littledale, J., refused to allow a wife to be asked whether her husband was not present when the wheat was stolen by the prisoner, although it does not appear that she claimed any privilege. That opinion would, however, hardly prevail against the decisions above referred to.

But though the husband and wife are, in such a case, competent, it seems to accord with principles of law and of humanity, that they should not be compelled to give evidence which tends to criminate each other; and in *R. v. All Saints, Worcester, supra*, Bayley, J., said that, if in that case the witness had thrown herself upon the protection of the court, on the ground that her answer might tend to criminate her husband, he thought she would have been entitled to it. See 1 Phill. & Arn. Ev., 10th ed. 73; *accord*.

Communications made by the husband to the wife, or by the wife to the husband during marriage, are expressly privileged by the 16 & 17 Vict. c. 83, s. 3, *ante*, p. 153. The communication must have been made *durante matrimonio*; *O'Connor v. Majoribanks*, 4 M. & Gr. 435, overruling *Beveridge v. Minter*, 1 C. & P. 364; the privilege lasts after dissolution of the marriage, or the death of one of the parties. *Monroe v. Twistleton*, Peake, Add. Ca. 221; *Aveson v. Kinnaird, Ltd.*, 6 East, 192; *Doker v. Hasler*, Ry. & M. 198. See, however, the remarks in 1 Taylor, Evid. § 831.

When a witness is privileged on the ground of confidence.] Counsel, *Curry v. Walker*, 1 Esp. 456; and solicitors, *R. v. Kingston, Da. of*, 20 How. St. Tr. 613; cannot be compelled to reveal communications made to them in confidence, as such. A person who acts as interpreter, *Du Barré v. Livette*, Peake, 78; S. C. 4 T. R. 756; or as agent, *Parkins v. Hawkshaw*, 2 Stark. 239; see also *Goodall v. Little*, 20 L. J., Ch. 132; between the solicitor and his client; or the solicitor's clerk, *Taylor v. Forster*, 2 C. & P. 195; *R. v. Upper Boddington*, 8 D. & Ry. 732; cannot be called upon to reveal such communications. So, a barrister's clerk cannot be called to prove his retainer. *Foot v. Hayne*, Ry. & M. 165. But Parke, B., is said to have held in *Forshaw v. Lewis*, 1 Jurist, N. S. 263, H. T. 1855, Ex., that the mere fact of retainer is not privileged from disclosure. See also *Levy v. Pope*, M. & M. 410, cited *post*, p. 161. Cases and the opinions of counsel thereon are privileged. *Reece v. Trye*, 9 Beav. 316; *Penruddock v. Hammond*, 11 Beav. 59; and see *R. v. Woodley*, 1 M. & Rob. 390.

A solicitor professionally employed to prepare an assignment of goods, which he declines to draw, will not be allowed to disclose the instructions given him; *Cromack v. Heathcote*, 2 B. & B. 4; nor to prove the contents of deeds or abstracts deposited with him as solicitor; *R. v. Upper Boddington*,

8 D. & Ry. 726. Where a solicitor is employed both by vendor and vendee to draw a conveyance, the draft of which is perused by another solicitor on behalf of the vendee, the former solicitor will not be allowed to produce the draft of the conveyance against the wishes of the party claiming under the vendee. *Doe d. Strobe v. Seaton*, 2 Ad. & E. 171. And generally where two parties employ one and the same solicitor he cannot disclose the title of either. Thus, where a borrower applies for a loan to the solicitor of the lender, and delivers him an abstract of title, the solicitor cannot afterwards be called against the borrower to prove the abstract. *Doe d. Peter v. Watkins*, 3 N. C. 421. Nor can admissions in conversation between the solicitors of the two parties relating to the cause be disclosed, unless made expressly for dispensing with proof in court of the facts stated. *Petch v. Lyon*, 9 Q. B. 147. Where a private account book delivered by the defendant to the plaintiff as his solicitor to prepare a case for counsel was tendered to fix the defendant with an admission of liability on a note made by defendant to plaintiff, the court held it inadmissible. *Cleave v. Jones*, 7 Exch. 421; 20 L. J., Ex. 239; Ex. Ch.

Matters communicated by the client to his counsel, or solicitor, with a view to professional assistance, or in a professional capacity, even though not made with reference to legal proceedings either existing or in contemplation, are privileged from disclosure; *Clark v. Clark*, 1 M. & Rob. 3; *Cromack v. Heathcote*, 2 B. & B. 4; *Walker v. Wildman*, Madd. & Geld, 47; *Greenough v. Gaskell*, 1 Myl. & K. 98; and see 4 B. & Ad. 876; *Carpmael v. Powis*, 1 Phill. Ch. 687; *Robson v. Kemp*, 5 Esp. 52; *Turton v. Barber*, L. R., 17 Eq. 329, following the principle laid down in *Minet v. Morgan*, L. R., 8 Ch. 361; see also cases collected *ante*, p. 146. The privilege or obligation of a legal adviser to withhold the communications between himself and client does not rest simply on the ground of confidence, for such a ground would extend the rule to many other cases where no privilege exists, but on a regard to the interests of justice, which require unreserved information from clients to those who are necessarily employed by them in the conduct of legal business. *Greenough v. Gaskell*, *Minet v. Morgan*, *supra*. On this principle a solicitor cannot be called to prove that a lease shown to him by his client at a professional interview was then unstamped. *Wheatley v. Williams*, 1 M. & W. 533. And where the assignees of a bankrupt brought trover for a lease, they were not permitted to call the solicitor of the bankrupt to show that it had been deposited with the defendant as a security after the act of bankruptcy. *Turquand v. Knight*, 2 M. & W. 98. And it seems that where the solicitor is so employed as to give the court a summary jurisdiction over him, his character is confidential within the rule. *Per Alderson*, B., S. C. *Id.* It is said, too, that a scrivener is on the same footing; at least where he is a solicitor also. S. C. *Id.* 100; *Anon.*, Skinner, 404; Lill. Pr. Reg. 556. The same rule applies in an action for divorce, even when the Queen's Proctor has intervened. *Branford v. Branford*, 4 P. D. 72.

The privilege is that of the client, and not of the solicitor; and formerly the court prevented the solicitor, though he were willing, from making the disclosure; B. N. P. 284; *Wilson v. Rastall*, 4 T. R. 759; unless the client waived the privilege, which, of course, he might do, at least in cases where the privilege was for his benefit only. *Merle v. More*, Ry. & M. 390; and see *Id.* 391, n. It seems that the evidence of the solicitor, in relation to a privileged matter, will be received, if the solicitor be willing to give it. *Hibberd v. Knight*, 2 Exch. 11. The judge is the proper person to decide whether the communication is privileged, subject to revision by the court. *Cleave v. Jones*, 7 Exch. 421; 20 L. J., Ex. 238; Ex. Ch. And he may hear witnesses to satisfy himself on this point. *Ib.*

It seems that no adverse presumption is to be drawn against a person refusing to allow his former solicitor to disclose statements he has made professionally to the solicitor. *Wentworth v. Lloyd*, 10 H. L. C. 589; 33 L. J., Ch. 688; *per* Ld. Chelmsford.

If the solicitor of one of the parties is called by his own client, and examined as to a matter which has been the subject of confidential communication, he may be cross-examined as to that matter, though not as to others. *Vaillant v. Dodemead*, 2 Atk. 524.

A party himself is not bound to disclose matters as to which his information is derived from privileged communications, the matters not being merely statements of fact patent to the senses. *Kennedy v. Lyell*, 23 Ch. D. 387, C. A.

What matters may be disclosed.] Matters not communicated to a solicitor in his professional capacity, as where he acts as under-sheriff at the time, must be disclosed. *Wilson v. Rastall*, 4 T. R. 753; *Cobden v. Kendrick*, *Id.* 431. So, matters communicated before the retainer. *Cuts v. Pickering*, 1 Vent. 197. All matters not confidentially communicated must be disclosed, as well as all matters which the solicitor would have known without being intrusted as solicitor in the cause; B. N. P. 284; provided the information was obtained by him independently, and not in the course of his professional employment. See observations in *Wheatley v. Williams*, 1 M. & W. 540, 541; and in *Magrath v. Hardy*, 4 N. C. 782, 795. So where counsel has given an opinion otherwise than in a professional capacity it must be disclosed. *Smith v. Daniell*, L. R., 18 Eq. 649. And a person who is not a solicitor may be compelled to disclose communications which have been made to him under a mistaken idea that he was one. *Fountain v. Young*, 6 Esp. 113.

Thus a solicitor may be called to prove a deed executed by his client, which he has attested; *Doe d. Jupp v. Andrews*, Cowp. 846; and when so called, he may be cross-examined as to what passed between him and his client at the time. *Cleve v. Powell*, 1 M. & Rob. 228. So, to prove the contents of a notice to produce; or an erasure in a deed belonging to his client; B. N. P. 284; or the delivery of a particular paper by his client; *Eicke v. Nokes*, M. & M. 304; or to prove who employed him to defend the cause; *Levy v. Pope*, *Id.* 410; or that he is in possession of a particular document belonging to his client, so as to let in secondary evidence of its contents after proof of notice to produce it; *Bevan v. Waters*, *Id.* 235; *Coates v. Mudge*, 1 Dowl. N. S. 540. And the solicitor may be called upon to state whether he has not the document in court. *Dwyer v. Collins*, 7 Exch. 639. So a communication between a solicitor and his client relative to a matter of fact only, where the character or office of solicitor is not called into action, is not privileged. *Bramwell v. Lucas*, 2 B. & C. 745. The defendant's solicitor may be called by the plaintiff to prove admissions made by his client, the defendant, in a conversation between plaintiff and defendant in his presence; though he cannot be allowed to prove such admissions in a conversation between himself and his client. *Griffith v. Davies*, 5 B. & Ad. 502. *Accord.* *Shore v. Bedford*, 5 M. & Gr. 271; *Weeks v. Argent*, 16 M. & W. 817. And where two parties employ the same solicitor, a letter by one of them to the solicitor, containing an offer to be made to the other, may be given in evidence against the writer of it. *Baugh v. Cradocke*, 1 M. & Rob. 182. So an application by one for time to pay money to the other. *Perry v. Smith*, 9 M. & W. 681. In an action for work done as solicitor of the defendant, the defendant, in order to show the plaintiff was retained by B. and not by defendant, may prove admissions made by the plaintiff to the professional

agent employed by him to sue out process in an action by B., which action was the work alleged to be done by the plaintiff for the defendant. *Gillard v. Bates*, 6 M. & W. 547.

Although a solicitor is not bound to disclose or produce deeds deposited with him as solicitor (*vide ante*, p. 146), yet if such deeds form no part of his client's title, he is bound to produce them; as where the solicitor for the lessor holds a lease, he may be subpoenaed by the lessee to produce it. *Doe d. Courtail v. Thomas*, 9 B. & C. 288. An attorney had received from his client, a former rector (who was also patron), a book to collect tithes by and also a map of the glebe, with a view to a sale of the advowson: in an action by the succeeding incumbent (who was presentee of the purchaser of the advowson), for land claimed as glebe, it was held that the attorney might be called upon to produce both, as evidence against him. *Doe d. Marriott v. Hertford, Ms. of*, 19 L. J., Q. B. 526. Where an attorney, employed by a client, B., to negotiate an exchange of land with A., which went off, obtained an abstract of title from A., he might produce it in a suit by A., for recovery of the land from a defendant claiming under A's ancestor, as secondary evidence against the plaintiff of the original deeds, although he had not had B's permission. *Doe d. Ld. Egrement v. Langdon*, 12 Q. B. 711. See further, *ante*, pp. 146, 147.

In an action by a cestui que trust against her trustee, a communication made by the defendant to an attorney relating to the matter of the trust was, on the ground that the real interest was in the plaintiff, held to be not privileged. *Shean v. Philips*, 1 F. & F. 449, Erle, J. See also *Mason v. Cattley*, 22 Ch. D. 609.

In the case of testamentary instructions to the testator's solicitor for drawing his will, what passed on the subject of that will as to any secret trust will be admissible in a suit between executors and next of kin. In such a case, indeed, both claim under the testator, and it would seem arbitrary to hold that the privilege belongs to one of the claimants more than to the other. *Turner, V.-C.*, *Russell v. Jackson*, 9 Hare, 387; 21 L. J., Ch. 146. It seems, too, that an illegal purpose, or a fraud contemplated, will not be privileged from disclosure; for it is no part of professional duty to be assisting in such cases. S. C. Thus, where A. applied to an attorney to advance money on a forged will, which the attorney refused to do, and he made no charge to A. for the interview, the communication was held not privileged. *R. v. Farley*, 1 Den. C. C. 197; *R. v. Jones*, *Ib.* 166. A counsel engaged for A. on a former inquiry on a criminal charge, may be called at a subsequent trial of an action wherein A. is a party, to prove as against him the state of a document produced and shown in evidence by A. on the former trial. *Brown v. Foster*, 1 H. & N. 736; 26 L. J., Ex. 249. The inquiry was, whether a certain entry was in a book when produced on the first occasion, which A. was suspected of having fraudulently made afterwards; and the counsel was called to negative the existence of it on the previous hearing.

Where the client is a witness he is liable to be cross-examined as to the instructions he had given his solicitor in another proceeding. *Maccann v. Maccann*, 3 Sw. & Tr. 142; 32 L. J., P. M. & A. 29.

Communications made to a herald or pursuivant of Heralds' College employed in the conduct and support of a protest against the enrolment of a pedigree therein are not privileged. *Slade v. Tucker*, 14 Ch. D. 824. So physicians, surgeons, and divines are not privileged from compulsive disclosures of communications, however confidential. *R. v. Kingston, Ds. of*, 20 How. St. Tr. 573; *Gilham's case*, 1 Moo. C. C. 186. See also *Garnet's case*, *Jardine's Gunpowder Plot*, p. 282, *et seq.*, ed. 1857, as to auricular confession, and *Best's Treatise on Evidence*, 4th ed. 718, *et seq.*

When a witness is privileged on the ground of public policy—disclosures by informers.] Questions on this branch of privilege arise generally in criminal and revenue cases. Such communications are undoubtedly to some extent privileged. *R. v. Hardy*, 24 How. St. Tr. 811; *R. v. Watson*, 2 Stark. 136; *Att.-Gen. v. Briant*, 15 M. & W. 169; *R. v. Richardson*, 3 F. & F. 693. See *Rosc. Cr. Ev.*, 8th ed. 154, 155.

When a witness is privileged on the ground of public policy—official communications.] There are some official communications relating to matters which affect the interests of the community at large, which may be withheld; such as communications between the governor and the law officers of a colony, *Wyatt v. Gore*, Holt, N. P. 299; between the governor of a colony and a secretary of state, *Anderson v. Hamilton*, 2 B. & B. 156, n.; between the governor of a colony and a military officer, *Cooke v. Maxwell*, 2 Stark. 183; between a military officer and a secretary of war, *Beatson v. Skene*, 5 H. & N. 838; 29 L. J., Ex. 430; the report of a military court of inquiry on the conduct of an officer, *Home v. Bentinck*, 2 B. & B. 130, Ex. Ch.; *Dawkins v. Rokeby, Ltd.*, L. R., 8 Q. B. 255, Ex. Ch. And where a minister of state appears and objects to the production of documents on the ground that it would be injurious to the public interests, he will not be compelled to produce them. *Beatson v. Skene*, *supra*. So on a trial for high treason, *Ld. Grenville* was called to produce a letter intercepted on its way through the post-office, but it was held that he was not bound to do so: the name of the case is not mentioned, but the facts were stated by *Ld. Ellenborough* in *Anderson v. Hamilton*, *supra*. Where a clerk from the War-office was sent with a paper with instructions to object to its production, *Ld. Campbell*, C. J., ordered it to be produced, not thinking the objection of a subordinate officer sufficient. *Dickson v. Wilton, Ltd.*, 1 F. & F. 424. This ruling was, however, disapproved in *Dawkins v. Rokeby, Ltd.*, *supra*, as contrary to the decision in *Home v. Bentinck*, *supra*. See further *H.M.S. Bellerophon*, 44 L. J. Ad. 5, and *Kain v. Farrer*, 37 L. T. 469, M.S. 1877, C. P. D. It seems that the objection to the evidence may be taken by the party interested in excluding it, although not taken by the witness himself. *Home v. Bentinck*, *supra*. The rule as to excluding evidence on the above ground is confined to communications made by and between ministers and officers of the government in the discharge of their public duty; and therefore a letter written by a private individual to the secretary of the postmaster-general complaining of the conduct of the guard of the mail is not privileged from disclosure. *Blake v. Pilfold*, 1 M. & Rob. 198. The speaker of the Irish House of Commons was held not to be bound to disclose what a member had there spoken; though he might be asked whether that member had spoken on a particular occasion. *Phunkett v. Cobbett*, 5 Esp. 136; 29 How. St. Tr. 71, *per Ld. Ellenborough*. A member of parliament cannot, without leave of the house, be compelled to answer questions respecting the votes of the members. *Chubb v. Salomons*, 3 Car. & K. 75; *per Pollock*, C. B. Confidential proceedings of the privy council cannot be divulged. *Lyster's case*, 16 How. St. Tr. 224. In *R. v. Watson*, 2 Stark. 148, an officer of the Tower of London was allowed to refuse to say whether a plan of the Tower which was produced was accurate or not.

Where a document is privileged from production on the ground of public policy, secondary evidence of its contents is inadmissible. *Home v. Bentinck*, *Anderson v. Hamilton*, and *Dawkins v. Rokeby, Ltd.*, *supra*; *Stace v. Griffith*, L. R., 2 P. C. 420.

Where for revenue or other similar purposes an oath of office has been taken by a person not to divulge matters which have come to his knowledge in his official capacity, he will not be allowed, if the interests of justice

are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax, being called to produce the books containing the appointment of a person as collector, objected on account of his oath, *Ld. Ellenborough* said that it did not protect him from giving evidence in a court of justice upon a writ of *subpend.* *Lee v. Birrell*, 3 Camp. 337.

A grand juror is also compellable in furtherance of justice to prove what passed before him. *Anon.*, 4 Bl. Comm. 126, note by Christian; *Sykes v. Dunbar*, 2 Selw. N. P., 13th ed., 1015; but this has been questioned. *Starkie on Slander*, 3rd ed., 475, c.

Privilege—how claimed.] It is for the witness himself to claim or to waive the privilege, as he sees fit; the counsel in the cause cannot argue the question in favour of the witness. *Thomas v. Newton*, M. & M. 48, n.; *R. v. Adey*, 1 M. & Rob. 94. Except, perhaps, in the case of official communications, as to which *vide ante*, p. 163. See as to a solicitor waiving his privilege, *ante*, p. 160.

The witness may claim his privilege at any part of the inquiry, and he does not waive it altogether by omitting to claim it as soon as he might have done so. *R. v. Garbett*, 1 Den. C. C. 258, overruling *East v. Chapman*, M. & M. 46; S. C., 2 C. & P. 573. The time for the witness to make the objection is after he is sworn. *Boyle v. Wiseman*, 10 Exch. 647; 24 L. J., Ex. 160.

Contradicting party's own witness.] If a witness gives evidence contrary to that which the party calling him expects, that party cannot give general evidence to show that the witness is not to be believed on his oath. *Ever v. Ambrose*, 3 B. & C. 749. And though it was always considered that a party might contradict the evidence of his own witness upon facts material to the issue, yet it was long a question whether it was competent to him to prove that the witness had previously given a different account of the transaction. S. C. *Id.*; *Wright v. Beckett*, 1 M. & Rob. 414; *R. v. Oldroyd*, R. & Ry. 88; *Dunn v. Aslett*, 2 M. & Rob. 122; *Holdsworth v. Dartmouth, Mayor of*, *Id.* 153; *Winter v. Butt*, *Id.* 357; *Allay v. Hutchings*, *Id.* 358, n.; *Melhuish v. Collier*, 15 Q. B. 878; 19 L. J., Q. B. 493. In the last case it was held that the witness may, at all events, be examined as to his former statements, and contradicted as to any facts that are relevant, although the direct effect may be to discredit him; and it has been the constant practice to call evidence to contradict the statements of other witnesses already called by the same party; as where attesting witnesses deny their own signature. See also *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193. And now it is provided by the C. L. P. Act, 1854, s. 22, that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

It will be seen that leave of the judge is made a condition precedent to the proof of former inconsistent statements, and also premonition and pre-examination as to such statements. In one particular the act seems to limit the former admitted liberty of calling witnesses to contradict another witness called by the same party; for in such cases it had been the practice for counsel to consult only their own judgment in calling other witnesses to prove all relevant facts, although their testimony may incidentally contra-

dict the testimony of one already called on the same side. This difficulty has been noticed by the court in *Greenough v. Eccles*, 5 C. B., N. S. 786; 28 L. J., C. P. 160; but it seems to have been the opinion of the court in that case, that the act is not to be construed as limiting the former liberty to call other witnesses to contradict the testimony of the adverse witness. It was there decided also that "adverse" means hostile, and not merely unfavourable, and that the inconsistent statements of the witness are only admissible where the judge considers his *animus* to be hostile. A series of letters may be used for the purpose of contradicting the witness, although one only be directly inconsistent. *Jackson v. Thomason*, 1 B. & S. 745; 31 L. J., Q. B. 11.

Where a witness gave evidence quite different from the proof in the brief which had been prepared in the usual way from the previous statements of the witness to the attorney, Bramwell, B., allowed him to be examined under this section as to his previous oral statements to the attorney; and also allowed the attorney to be called to contradict him. *Amstell v. Alexander*, 16 L. T., N. S. 830. But in a similar case it was held that the section was not meant to apply to the loose statements made by the witness to the attorney with a view to prepare the evidence, and granted a rule *nisi* for a new trial, on the ground that witnesses had been called at the trial to prove such statements. *Reed v. King*, 30 L. T. 290, H. T. 1858, Ex. Where a witness had given contrary evidence on his examination in bankruptcy, it seems that evidence was allowed to be used to contradict him. *Pound v. Wilson*, 4 F. & F. 301. See also *Dear v. Knight*, 1 F. & F. 433.

It has been held that where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be necessarily repudiated. *Bradley v. Ricardo*, 8 Bing. 57. But in *Faulkner v. Brine*, 1 F. & F. 255, Ld. Campbell, C. J., intimated that the effect of such contradiction was to throw over the evidence of the witness altogether.

It was held that under the C. L. P. Act, 1854, s. 23, *post*, p. 171, it was not competent to a party to contradict his own witness, by the witness's previous statements in writing. *Ryberg v. Ryberg*, 32 L. J., P. M. & A. 112. In this case, however, reference does not appear to have been made to sect. 22, *ante*, p. 164, which would have led to an opposite conclusion.

Opinion of witness, when admissible.] In general the mere opinion of a witness as to any of the facts in issue is inadmissible as evidence. But it is admissible upon questions of science. Thus where the question was, whether a bank erected to prevent the overflowing of the sea had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour were held to be admissible. *Folkes v. Chadd*, 3 Doug. 157. And where the question is whether a seal has been forged, seal engravers may be called to show a difference between a genuine impression and that supposed to be false. *Ibid. per* Lord Mansfield, C. J. So a physician, who has not seen the particular patient, may, after hearing the evidence of others at the trial, be called to testify as to the general effects of the symptoms described by them and their probable consequences in the particular case; Peake, Evid. 208; or he may be asked whether the facts proved are symptoms of insanity; *R. v. M'Naghten*, 10 Cl. & Fin. 260; but he cannot be asked, generally, whether, upon the evidence on the cause, he is of opinion that a party is insane or incapable of distinguishing between right and wrong; for this would leave him at liberty to find facts as well as to form an opinion on those facts, and in effect put him in the place of the jury. *R. v. Frances*, 4 Cox, C. C. 57; *R. v. Layton, Id.*, 149. The opinion of

a person conversant with the business of insurance, as to whether the communication of particular facts would have varied the terms of insurance, has been admitted in evidence on several occasions both in actions on the policy and against insurance brokers for negligence. *Berthon v. Loughman*, 2 Stark. 258; *Rickards v. Murdock*, 10 B. & C. 527; *Chapman v. Walton*, 10 Bing. 57. But in other cases the admission of this kind of evidence has been discountenanced. *Carter v. Boehm*, 1 W. Bl. 594; and in *Campbell v. Rickards*, 5 B. & Ad. 840, a new trial was granted because such evidence had been admitted, and it was held that the materiality of a fact concealed was a question for the jury alone, and that "witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another;" see also *Lindenau v. Desborough*, 8 B. & C. 586; *Westbury v. Aberdeen*, 2 M. & W. 267. The evidence of a shipbuilder has been admitted on a question of seaworthiness, though he was not present at the survey; *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. R. Exchange Assur. Co.*, Peake, 25; and the opinion of a nautical witness on a question of skilful navigation, assuming the facts to be true; *Fenwick v. Bell*, 1 Car. & K. 312. The opinions of persons versed in the laws of a foreign country are also admissible; *Chaurand v. Angerstein*, Peake, 44; and see the cases on this point, *ante*, p. 114. Persons conversant with old MSS. may be called to speak to the date of an old writing. *Tracy Peerage case*, 10 Cl. & F. 154. Where the question is, as to the correct judgment of a captain in abandoning his ship, a witness may be asked the result of his personal observation of the "general habits" of the captain as to sobriety. *Alcock v. R. Exchange Assur. Co.*, 13 Q. B. 292. To ascertain the value of a life annuity, an accountant, who stated he was conversant with the business of life assurance offices, was allowed to refer to the Carlisle Tables used by those offices, showing the expectation of life, and then state the sum required to purchase the annuity. *Rowley v. L. & N. W. Ry. Co.*, L. R., 8 Ex. 221, Ex. Ch.

As to calling persons skilled in handwriting to prove forgery or to establish the genuineness of ancient documents, see *ante*, p. 130, *et seq.*

On the value to be attached to the opinions of expert witnesses, see the observations of Jessel, M. R., in *Abinger, Ltd., v. Ashton*, L. R., 17 Eq. 373, *et seq.*

Memorandum to refresh witness's memory.] A witness will be allowed to refer to an entry, or memorandum, made by himself at the time of, or shortly after the occurrence of the fact to which it relates, in order to refresh his memory; although the entry or memorandum would not of itself be evidence. *Kensington v. Inglis*, 8 East, 289. Even a receipt on unstamped paper may be used for this purpose. *Maughan v. Hubbard*, 8 B. & C. 14. Nor does the use of such a memorandum by a witness make it evidence in itself. *Alcock v. R. Exchange Assurance Co.*, *supra*. But he cannot refresh his memory by extracts from a book, though made by himself; *Doe d. Church v. Perkins*, 3 T. R. 749; nor speak from having refreshed it out of court; at least unless he produces the memorandum in court; *Beech v. Jones*, 5 C. B. 696; nor by a copy of a book, unless the witness himself saw the copy made and checked it at the time by personal examination while the subject was fresh in his recollection; for then the copy is, in effect, an original entry by himself. *Burton v. Plummer*, 2 Ad. & E. 341; *Talbot de Malahide, Ltd., v. Cusack*, 17 Ir. C. L. R. 213, Q. B. In *Burton v. Plummer*, *supra*, a sale was proved by a clerk who refreshed his memory from a ledger entered from a waste book, the waste book being

kept by the clerk and the ledger copied by another party under the eye of the clerk. A surveyor may refer to a printed copy of a report made by himself to his employers, and compiled from his rough notes made on the spot. *Horne v. Mackenzie*, 6 Cl. & Fin. 628. So a witness may refresh his memory by reference to entries in a log-book, which he did not write with his own hand, but which he examined from time to time shortly after the events recorded. *Burrough v. Martin*, 2 Camp. 112. Where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book, but seeing my initials, I have no doubt that I received the money;" this was held sufficient evidence. *Maugham v. Hubbard*, ante, p. 166; *R. v. S. Martin's*, 2 Ad. & E. 210. A printed form of lease, read over to a tenant as the terms of his tenancy, but not signed according to Statute of Frauds, may be used to refresh the memory of the witness who read it to him. *Bolton, Ltd., v. Tomlin*, 5 Ad. & E. 856. If the witness be blind, the paper or memorandum may be read over to him in court. *Catt v. Howard*, 3 Stark. 4. A witness was permitted to refresh his memory from a deposition made and signed by him, shortly after the fact to be proved, on examination before commissioners of bankrupts. *Smith v. Morgan*, 2 M. & Rob. 257. In this case, Tindal, C. J., permitted it to be only so far used as to refresh the memory of the witness as to the date of a single transaction, on the authority of *Vaughan v. Martin*, 1 Esp. 440; but it is observable that in *Vaughan v. Martin*, the whole account of the act of bankruptcy seems to have been read to the witness, a very aged person, who was then asked "whether the matters there stated were true!" Such an examination was also allowed to be used by a witness in like manner by Pollock, C. B., in *Wood v. Cooper*, 1 Car. & K. 645. The examination in both cases was taken recently after the facts, and this seems essential to the use of any memorandum or paper for refreshing memory. *Whitfield v. Aland*, 2 Car. & K. 1015.

[*Right to inspect memorandum.*] Where the witness gives his evidence after having referred to a book or other document, it must be produced; *Howard v. Canfield*, 5 Dowl. 417; *Beech v. Jones*, 5 C. B. 696; and the counsel on the other side has a right to inspect it, without being bound to read it in evidence; *Sinclair v. Stevenson*, 1 C. & P. 582; *R. v. Ramsden*, 2 C. & P. 603. He may cross-examine upon the entries referred to by the witness, without making the book evidence *per se* for the party who produces the witness; but if he cross-examines as to other entries in the same book, he makes them part of his own evidence. *Gregory v. Tavernor*, 6 C. & P. 281, *per* Gurney, B.; *Whitfield v. Aland*, 2 Car. & K. 1015, Wilde, C. J. Where a paper is put into a witness's hand only to prove the handwriting, and not to refresh his memory, the opposite party is not entitled to see it. *Sinclair v. Stevenson*, *supra*; see further *post*, p. 170. And where the question founded on a document handed to witness to refresh his memory wholly fails in its object, it has been considered that the opposite party is not entitled to inspection. *R. v. Duncombe*, 8 C. & P. 369. The reason for permitting adverse inspection seems to be to check the use of improper documents;—to secure the benefit of the witness's recollection as to the whole facts;—and to compare his oral testimony with the written statement. If it fails to refresh his memory, or is not used for that purpose, the right of inspection fails.

[*Cross-examination.*] Upon cross-examination, counsel may lead a witness so as to bring him directly to the point in his answer; but he cannot, if the witness shows an obvious leaning in his favour, go the length of putting

into the witness's mouth the very words which he is to echo back again. *Hardy's case*, 24 How. St. Tr. 755. Indeed, in such a case, the usual latitude of cross-examination would perhaps not be allowed. It is not allowable for counsel, on cross-examination, to mislead the witness by assuming facts to be evidence which have not been proved, or to try to entrap him by misstatement. See cases before Abbott, C. J., *Hill v. Coombe*, Exeter Sp. Ass., 1818; *Handley v. Ward*, Lancaster Sp. Ass. 1818 (qy. 1819), cited in Stark. Ev., 4th ed. 197 (s). This is sometimes attempted in practice by handing wrong papers to a witness, in order to test his judgment in the proof of handwriting. It is not competent to counsel to question a witness concerning a fact irrelevant to the matter in issue for the mere purpose of discrediting him by calling other witnesses to disprove what he says; *Spenceley v. De Willott*, 7 East, 109; and should the witness answer such a question, evidence cannot be given to contradict; *Harris v. Tippet*, 2 Camp. 637; or to confirm his evidence. *Tolman v. Johnstone*, 2 F. & F. 66. See further, *post*, pp. 171, 172.

By Rules, 1883, O. xxxvi., r. 38, "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter." It would seem, however, that this rule is either in accordance with the common law rule, or is *ultra vires* as infringing J. Act, 1875, s. 20, *ante*, p. 143.

In consequence of the general rule that the contents of a written document ought to be proved by the production of it, and not by oral testimony, it was held in *The Queen's case*, 2 B. & B. 287, *et seq.* that it was not competent to ask a witness, even on cross-examination, respecting a statement formerly made by him in writing without showing to him the writing referred to, and putting it in evidence as part of the case of the cross-examining party either immediately or in the ordinary course of the cause; and this opinion of the judges has been since constantly acted upon, whether the question be put merely to discredit the witness by contradicting him, or as conducive to proof of the matter in issue. *Macdonnell v. Evans*, 11 C. B. 930; 21 L. J., C. P. 141.

It seems, however, that when the statement in writing is an affidavit or deposition filed in some court, the rule in *The Queen's case*, *supra*, is satisfied by the production of an examined or office copy at the trial, for in many cases, witnesses have been allowed to be cross-examined on examined or office copies of their previous depositions, and such copies have been allowed to be used to contradict them. Thus, on an issue out of Chancery, an examined copy of the deposition of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue. *Highfield v. Peake*, M. & M. 109; *Burnand v. Nerot*, 1 C. & P. 578. So an examined copy of an answer, made by a defendant in Chancery, was admitted to contradict the evidence given by him in a subsequent action. *Ever v. Ambrose*, 4 B. & C. 25. So an attested copy of an affidavit, made by the witness and filed in another cause, was held sufficient to contradict him, on proof being given of his identity. *Garvin v. Carroll*, 10 Ir. L. R. 323; and in *Davies v. Davies*, 9 C. & P. 252, Gurney, B., allowed a witness to be cross-examined on an office copy of his affidavit filed in the cause, a judge's order having, under the old practice, been obtained to admit it. As to the use of an office copy, now see Rules, 1883, O. xxxvii. r. 4, and observations thereon, *ante*, p. 92.

The only case which is cited in support of the proposition that the original must be shown to the witness is that of *Bastard v. Smith*, 10 Ad. & E. 213, 214, in which Tindal, C. J., is said, at *Nisi Prius*, not to have

permitted a witness to be cross-examined as to the contents of his former deposition, without first refreshing his memory with the original; as, however, the original was in court, it seems clear that no attempt was made to use an office copy, and all that appears from the report of the case on the motion is, that the court would not interfere with the master's allowance of the costs of bringing down the original deposition. This case can therefore hardly be considered as overruling the numerous cases that have been above cited where the contrary rule was followed.

In *Henman v. Lester*, 12 C. B., N. S. 781; 31 L. J., C. P. 366, it was held by Willes and Keating, JJ., *diss.* Byles, J., that a plaintiff could be asked, on cross-examination, in order to test his credit, as to proceedings taken against him in the County Court, without producing the record of the court; at the trial, Pollock, C. B., had admitted the question on the broad ground that the contents of a written document might be proved by the admission of a party to the cause, whether in or out of the witness-box; he did not, however, hold that the witness was *compelled* to answer the question; and the court said he could not be so compelled. In *Macdonnell v. Erans*, *ante*, p. 168, Cresswell, J., said that a witness could not be asked on cross-examination, in order to test his credit, whether he had been convicted of a crime, as that would appear by the record. This was denied by Willes and Keating, JJ., in *Henman v. Lester*, *supra*; *contra*, Byles, J.

By the C. L. P. Act, 1854, s. 24, "a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." The effect is this. The witness, in the first instance, may be asked, whether he has made such and such a statement, without its being shown to him. *Sladden v. Sergeant*, 1 F. & F. 322, *cor.* Willes, J. If he denies that he has made it, the opposite party cannot put in the statement, without first calling his attention to it (showing it, or at least reading it to him), and to any parts of it relied upon as a contradiction. If the witness, instead of denying that he has made the statement, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the court and jury. If he is aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, without its being produced, on the general rule that if part of any connected conversation or statement be given, the whole may be used (*vide post*, p. 174); or he may ask the judge, under the latter part of the section, to require the production of the writing, for the last provision of the above section was probably introduced for the purpose of guarding against an unfair use of the power of cross-examining upon a document which either has no existence in fact, or may have been only partially brought before the jury and imperfectly understood. This provision would seem, however, not intended in any way to narrow the old practice (*vide ante*, p. 168) as to the production of original documents filed in court, and would be substantially satisfied by the production of any copy on which a witness previously to this enactment could have been cross-examined. See 2 Taylor on Evidence, § 1303.

We have seen, *sub tit. Admissions, ante*, p. 75, that if a conversation be given in evidence to prove an admission, the *whole* of it must generally be laid before the jury, and this if omitted may be got out by cross-examination, subject, however, to the limitation laid down hereafter under the head of *Re-examination, post*, p. 174; 1 Taylor, Evidence, § 655. So if any letter, written statement, or single document be given in evidence; the opposite party may insist on having the whole read and given in evidence as part of the case of the party adducing such evidence. But this rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts or entries in one entire collection of documents, as letter-books, court-rolls, &c., shall *all* be put in evidence by the party producing and reading any one of them, unless they are on the face of them connected with the one already in evidence; and this seems to be the rule whether the documents be of a public or a private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account-book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read. *Catt v. Howard*, 3 Stark. 6. See also *Rennie v. Hall*, Manning's N. P. Index, 376. Where the plaintiff called for the production of defendant's letter-book, and read letters of the defendant from it, the defendant was not therefore permitted to read from it, on his own behalf, other letters not referred to in the letters read by the plaintiff. *Sturge v. Buchanan*, 10 Ad. & E. 598. And where a book of bankruptcy proceedings was put in to prove certain depositions for the plaintiff, the defendant's counsel was not allowed to use other parts of the book to refresh the memory of a witness, unless he put it in as part of his own evidence. *Whitfield v. Aland*, 2 Car. & K. 1015, *per* Wilde, C. J.; *Gregory v. Tavernor*, 6 C. & P. 281, *per* Gurney, B. But the plaintiff cannot read the examination of a defendant by commissioners of bankrupt taken on one day without also reading his continued examination on another day; *Smith v. Biggs*, 5 Sim. 391; nor the cross-examination of defendant without his examination in chief; S. C.; nor the examination in chief without the cross-examination. *Goss v. Quinton*, 3 M. & Gr. 825. Where an answer in Chancery by a witness was put in only to prove his incompetency on the ground of interest, the adverse party could not thereupon read the whole in order to prove the issue. B. N. P. 238.

When a document is put into the hands of a witness under cross-examination merely to prove the signature, or identity, or general nature of it, the opposite party is not entitled to immediate inspection of it, except sufficiently to enable him to re-examine about the writing, and also to identify the document in case it should afterwards be put in evidence; he may not read the document through, or comment upon its contents until it is put in on the other side, nor does it till then become evidence in the cause; but if any question be put as to its contents, or any further question be founded on it, there will be a right to inspect it. *Semb. Cope v. Thames Haven Dock*, 2 Car. & K. 757; *Collier v. Nokes*, *Id.* 1012; *Peck v. Peck*, 21 L. T., N. S. 670; H. T. 1870, C. P. See 2 Taylor, Evidence, § 1307. And, in general, mere proof of handwriting by a witness, whether on examination in chief or cross-examination, does not oblige the party to put it in evidence or entitle his opponent to use it as evidence, although its absence may, of course, be legitimate ground of comment by him. But the handwriting may of course be disputed if afterwards put in. *Vide ante*, p. 167.

A witness may be cross-examined as to his having omitted to mention a

fact on a former examination, though that examination was in writing and not produced. *Ridley v. Gyde*, 1 M. & Rob. 197. As to discrediting witnesses on cross-examination, *vide infra*.

As to cross-examination of deponent where evidence is given by affidavit, *vide post*, p. 176.

Where a witness is brought into court merely for the purpose of producing a written instrument, which is to be proved by another witness, he need not be sworn; *Perry v. Gibson*, 1 Ad. & E. 48; and, unless sworn, the other party will not be entitled to cross-examine him. And where a person called to produce a document was sworn by mistake and was asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush v. Smith*, 1 C. M. & R. 94. So, if a wrong witness is called in consequence of a mistake in his name, and is dismissed on the discovery of the mistake, the other side has no right to cross-examine him. *Clifford v. Hunter*, 3 C. & P. 16. So, if he is called by error of the counsel and actually sworn, yet if dismissed before examination, he is not liable to be cross-examined. *Wood v. Mackinson*, 2 M. & Rob. 273.

[*Contradicting opponent's witness.*] In order to impeach the credit of a witness, evidence may be given of statements made by him at variance with his testimony on the trial; but to lay a foundation for the evidence of such contradictory declaration or conversation, the witness must be asked, on cross-examination, whether he has made such declaration or held such conversation. *The Queen's case*, 2 B. & B. 301. Before he can be contradicted he must be asked as to the time, place and person involved in the supposed contradiction. It is not enough to ask him the general question whether he has ever said so-and-so. *Per Tindal, C. J., Angus v. Smith*, M. & M. 474. Where the witness merely says that he does not recollect making the statement, the practice was not uniform as to whether the statement might be proved by the cross-examining party.

But the point is now settled; for the C. L. P. Act, 1854, s. 23, provides that, "if a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." See *Ryberg v. Ryberg*, 32 L. J., P. M. & A. 112, cited *ante*, p. 165.

Where the object in proving the statements of a witness is not merely to contradict him, but to impeach his moral character by proof of loose and unbecoming language, the evidence seems admissible without previous inquiry of himself. *Carpenter v. Wall*, 11 Ad. & E. 803. Where a document is offered in evidence to contradict the statement of a witness as to a material fact denied by him, it is admissible though it also tends to prove the issue in the cause for which purpose alone it would have been inadmissible. *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267.

It has been doubted whether to corroborate the testimony of the witness whose credit has been impeached, evidence *contra* is admissible that the witness affirmed the same thing before, on other occasions; *Gilb. Ev.* 150; *B. N. P.* 294; *Lutterell v. Reynell*, 1 Mod. 283; but the better opinion is that such evidence is generally inadmissible. *R. v. Parker*, 3 Doug. 242. *Acc. per* Ld. Redesdale in *Berkeley Peerage case*, as cited in 2 Phill. Ev., 10th ed. 523. It has been observed, however, that the rule is subject to this

exception, that where counsel on the other side impute a design to misrepresent, from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. 2 Phill. Ev., *Ibid.* "If a witness speak to facts negating the existence of a contract, and insinuations are thrown out that he has a near connection with the party on whose behalf he appears; or that a change of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstances." Notes to Pothier on Oblig., by Sir W. D. Evans, vol. 2, p. 251.

An opponent's witness may be contradicted on all points material to the issue; but he cannot be contradicted upon any point not material to the issue, with a view of showing that his evidence, generally, is not worthy of credit. The case of *Palmer v. Trower*, 8 Exch. 247, is a strong illustration of the rule. There the plaintiff sued the executor of A. on a joint and several note of A. and B.; the defence being that the note was forged by the plaintiff: the defendant being called as a witness denied, on cross-examination, that he had ever heard B. admit that he had signed the note; it was held, that the plaintiff could not call a witness to prove that B. had made such an admission in the defendant's hearing. It should seem that if the admission of B. had been in A.'s presence, and the note had been sued upon in A.'s lifetime as a joint note, the question would have been material and relevant. A witness, being asked on cross-examination whether he had not said that a bribe had been offered to him to give particular evidence in the case, denied that he had said so: it was held, that no evidence could be adduced to show that he *did* say so. *Att.-Gen. v. Hitchcock*, 1 Exch. 91. The rule seems to be, that if the witness's answer to a question would, if truly made, tend to qualify, or contradict, or discredit some other relevant part of his testimony, then other evidence may be received to contradict him; and a fact may be considered as "relevant," though not part of the transaction in issue, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case; *Semb. Melhuish v. Collier*, 15 Q. B. 878; 19 L. J., Q. B. 493; but a merely irrelevant inquiry cannot be allowed. It is true that by showing the levity or falsehood of a witness even on irrelevant matters, his testimony would in some degree be discredited, yet the expediency of confining the field of inquiry at *Nisi Prius* within a reasonable compass has made it necessary to assign a limit to such collateral issues. Without such restraint the examination of each witness might give rise to different issues remote from the immediate issue on the record, which the parties have not come prepared to try, and by which both witnesses and parties might be unfairly prejudiced. On this sort of evidence the observations of the court in *Att.-Gen. v. Hitchcock*, *supra*, are very instructive and important. See also *Hollingham v. Head*, 4 C. B., N. S. 388; 27 L. J., C. P. 241, cited *ante*, p. 76.

Evidence of character.] We have seen (*ante*, p. 83) that in actions unconnected with character, evidence of the character of the parties is inadmissible, as irrelevant to the issue. As, however, the veracity of the witness is always a point in issue, his character for veracity may be impugned by the party interested in discrediting him, by showing that he is unworthy of credit. If a witness's character for veracity be impeached, witnesses may be called in support of it.

Although evidence is admissible to show that a witness bears such a character and reputation that he is unworthy of credit, yet it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one, *vide infra*) to prove particular facts in order to discredit him. *R. v. Watson*, 2 Stark. 152; *R. v. Laver*, 14 How. St. Tr. 285. The question as to the witness's character for credibility must be put in a general form. *Mawson v. Hartsink*, 4 Esp. 102. The usual form of the question is as follows:—"From your knowledge of the witness do you believe him to be a person whose testimony is worthy of credit?" See *R. v. Rowton*, Leigh & Cave, C. C. 520; 34 L. J., M. C. 57; and *R. v. Brown*, L. R., 1 C. C. 70. And although a witness's answer upon a collateral fact is usually conclusive; *R. v. Watson*, *supra*; yet where the object of the inquiry is to prove that the witness has endeavoured to corrupt another to give false testimony in the cause, his denial of the fact or refusal to answer will not prevent the party from proving it by other evidence. *The Queen's case*, 2 B. & B. 311.

But this can only be done by the opposite party; the person calling a witness, having once put him forward as a person worthy of belief, though he may contradict him, cannot afterwards discredit him, if the testimony of the witness should turn out unfavourable, or even should the witness assume a position of hostility towards the party calling him. *Ever v. Ambrose*, 3 B. & C. 749. This is the rule at common law, and is affirmed by the C. L. P. Act, 1854, s. 22, *ante*, p. 164.

By the C. L. P. Act, 1854, s. 25, "a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, . . . shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." As to the signature to the certificate, see *R. v. Parsons*, L. R., 1 C. C. 24.

As to a party contradicting his own witness, see *ante*, p. 164. As to cross-examining him, see *ante*, p. 156.

Evidence that a witness is not impartial.] What has been said as to not giving evidence of particular facts merely for the purpose of impeaching the credit of a witness, does not apply where the facts sought to be proved go to show that the witness does not stand indifferent between the contending parties. Best, Evidence, § 644. Thus in *R. v. Yewing*, 2 Camp. 638, the witness was asked whether he had not said that he would be avenged upon the prisoner, and would soon fix him in gaol. This he denied, and Lawrence, J., allowed him to be contradicted. So also it may be proved that a witness has been bribed; *R. v. Langhorn*, 7 How. St. Tr. 446; or that he has endeavoured to suborn others; *R. v. Stafford, Ltd.*, *Id.* 400; both which cases were recognized in *Att.-Gen. v. Hinchcock*, 1 Exch. 93; *ante*, p. 172.

Recalling witness.] It is in the discretion of the judge whether he will permit a witness to be recalled. *Adams v. Bankart*, 1 C. M. & R. 681; *The Queen's case*, 2 B. & B. 284; *Catlin v. Barker*, 5 C. B. 201.

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination,

must be confined to the subject-matter of the cross-examination. The rule with regard to re-examination is thus laid down by Abbott, C. J., in *The Queen's case*, 2 B. & B. 297: "I think the counsel has a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. . . . I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole that was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion." This statement of the rule was, however, qualified in *Prince v. Samo*, 7 Ad. & E. 627, where it was held that a witness of the plaintiff, cross-examined as to assertions of the plaintiff in a particular conversation, could not be re-examined as to other *unconnected* assertions of the plaintiff in the same conversation, although connected with the subject of the suit. In that case the other part of the conversation was attempted to be shown for the plaintiff in order to prove plaintiff's case by his own assertion; and it was observed by the court that, if such proof were admitted, it ought to go to the jury, and might thus obtain a verdict for the plaintiff on his own unsupported assertion out of the court. It must not therefore be assumed that cross-examination on part of a conversation necessarily lets in proof of the whole of it.

As to re-examination of a witness after cross-examination under C. L. P. Act, 1854, s. 24, as to his previous statements in writing, *vide ante*, p. 169.

Where a witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett v. Tregonning*, 3 Ad. & E. 554.

Evidence in reply.] When a party is taken by surprise, he should be allowed to produce fresh evidence to meet the case against him. *Bigsby v. Dickinson*, 4 Ch. D. 24, C. A.

PROOF BY AFFIDAVITS OR DEPOSITIONS.

As has been already stated, proofs are usually, except by agreement between the parties, to be given at the trial by the oral evidence of witnesses, *ante*, p. 143; in certain cases, however, affidavits or depositions are allowed to be substituted for such oral evidence.

The following are the rules relating to the subject. By Rules, 1883,

O. xxxvii., r. 1, "The court or a judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the court or judge may think reasonable, or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit." By rule 3, "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on" other than *ex parte* applications, "upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence." By rule 4, "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible." See observations on this rule *ante*, p. 92. By rule 5, "The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct." Rule 6 provides the form of order for a commission to examine witnesses, and of the writ of commission. By rule 16, the depositions authenticated by the signature of the examiner are to be transmitted by him to the central office and there filed. By rule 24, "No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf." By O. xxxviii., r. 3, "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." By rule 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself." By rule 17, "Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner."

Affidavits or depositions so taken will, under O. xxxvii., r. 4, *supra*, be proved at the trial by production of office copies; see also *Duncan v. Scott*, 1 Camp. 101; *Fleet v. Perrins*, L. R., 3 Q. B. 536; L. R., 4 Q. B. 500, Ex. Ch.; but the order so to take evidence must, it seems, be previously proved; see *Bayley v. Wylie*, 6 Esp. 85, *post*, p. 176. The judge cannot, under rule 1, at the trial, order an affidavit to be read, when the opposite party *bonâ fide* desires the witness to be produced for cross-examination. *Blackburn Union v. Brooks*, 7 Ch. D. 68.

By Rules, 1883, O. xxxviii., r. 25, "Within 14 days after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon or the court or a judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his

solicitor a list thereof." Rule 26 : "The defendant within 14 days after delivery of such list, or within such time as the parties may agree upon, or the court or a judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof." Rule 27 : "Within 7 days after the expiration of the last-mentioned 14 days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof." Rule 28 : "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

The consent under rule 25 must be a formal consent in writing. *New Westminster Brewery Co. v. Hannah*, 1 Ch. D. 278. It may be given by the guardian *ad litem* of an infant. *Knatchbull v. Fowle*, *Id.* 604. The plaintiff may use affidavits in reply which are confirmatory only of his evidence in chief, notwithstanding rule 27. *Peacock v. Harper*, 7 Ch. D. 649.

Where the defendant's evidence is given by affidavit, supplemented by the oral testimony of the deponents, the plaintiff is not entitled to cross-examine those deponents whose affidavits had not been read. *Massam v. Thorley's Cattle Food Co.*, W. N. 1879, p. 181, Malins, V.-C. As to the power of the judge to order a trial by witnesses, and to exclude the affidavits filed, see *Lovell v. Wallis*, W. N. 1883, p. 231, M.S. Kay, J.

The power of authorising the examination of witnesses out of court was formerly given to the courts of common law by stat. 1 Will. 4, c. 22. These provisions of the statute are no longer in force, but it is necessary shortly to state them, and the decisions thereon, as they may afford some guide to the practice under O. xxxvii., r. 5, *ante*, p. 175. Sect. 4 empowered a judge to order any witness within the jurisdiction to be examined orally before an officer of the court or other person named in the order, or to order a commission to issue to examine in places out of the jurisdiction; the same or a subsequent order was to give "directions touching the time, place, and manner of such examination." Sects. 5, *et seq.*, contained provisions for examination of witnesses on oath and for the production of documents. By sect. 10, "no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial."

Except in the case of lost commissions of ancient date, the commission must have been proved at the trial, in order to make the examination evidence. *Bayley v. Wylie*, 6 Esp. 85; *Rouse v. Brenton*, 8 B. & C. 765. And on the same principle it seems that where the examination is taken by order, the order should be produced, though the certified examinations themselves require no proof, being made evidence by the 8 & 9 Vict. c. 113, s. 1, *ante*, p. 94, and may be proved by office copies under O. xxxvii., r. 4, *ante*, p. 175.

The inability of the witness to attend must have been proved by a witness who knew it otherwise than by hearsay. *Robinson v. Markis*, 2 M. & Rob.

375. The court would not interfere with the discretion of the judge exercised under this section, unless he had been misled by false evidence. *Beaufort, Dk. of, v. Crawshaw*, L. R., 1 C. P. 699. It appears that the affidavit of the witness's ordinary medical attendance was sufficient evidence. *Ibid.* "Permanent sickness," meant such as to preclude the hope of deponent attending the trial within a reasonable time. *Ibid.* Where the witness had actually sailed, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds. *Ponsick v. Agar*, 6 Esp. 92. It was held not sufficient that the witness was a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving some effort had been recently made to procure his attendance. *Falconer v. Hanson*, 1 Camp. 172.

Where depositions on interrogatories are read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. *Temperley v. Scott*, 5 C. & P. 341. The answers to illegal questions put under the authority of a commission, might be objected to and struck out at *Nisi Prius*; but not by the party who put the question. *Hutchinson v. Bernard*, 2 M. & Rob. 1. The deposition might be read, though it appeared on the face of it that the deponent referred to papers not shown to the commissioners. *Steinkeller v. Newton*, *Id.* 372. So, where copies of documents and oral evidence relating to their contents were received by the commissioners without objection from the other party who joined in the commission, it was held that the latter could not, at the trial, object to the non-production of the originals. *Robinson v. Davies*, 5 Q. B. D. 26. Where the commission was issued irregularly, or the execution was against good faith, yet it seems the judge must have received the depositions at *Nisi Prius*, if there was due notice of execution to the other side; though the court might, under such circumstances, set aside the verdict and grant a new commission. *Steinkeller v. Newton*, as reported (variously) in 1 Scott, N. R. 148; 8 Dowl. 579, and 9 C. & P. 313. See *White v. Hallett*, 28 L. J., Ex. 208, where it seems to have been doubted whether notice of the execution was necessary, if there was notice of the commission. Where the commission directed the depositions to be returned, certified copies returned were inadmissible. *Clay v. Stephenson*, 7 Ad. & E. 185. The depositions could not be read if the order, on which the commission issued, did not pursue the statute; thus, if it omitted to name a place of examination, though one be inserted in the commission. *Greville v. Stulz*, 11 Q. B. 997. But if the order was not produced it was presumed that it was in conformity with the commission. S. C. And the omission made the commission irregular only, and not void, and might therefore be waived by the conduct of parties; as by acting under it, or using the documents obtained under it and returned with it. *Hawkins v. Baldwin*, 16 Q. B. 375; 20 L. J., Q. B. 198. Where the order obtained a clause as to the signature of the depositions which was omitted in the commission, and the depositions were not signed in this particular way, it was held that the clause was merely directory, and as the commission had been executed in conformity with the statute, "as to the time, place, and manner of examination," the depositions were receivable in evidence; *Hodges v. Cobb*, L. R., 2 Q. B. 652; and it appears that a mere irregularity in the execution of the commission could only be taken advantage of by an application to set aside the depositions, and if this had not been done they were admissible in evidence. S. C. *Grill v. General Screw Collier Co.*, L. R., 1 C. P. 600. The commission was sufficient though the order did not name the commissioners. *Nicol v. Alison*, 11 Q. B. 1006. If the order and commission required witnesses to be examined apart, this was presumed to have been done, unless the contrary appeared by the depositions

returned. *Simms v. Henderson*, *Id.* 1015. Where the return was ordered to be made to the master's office, and a clerk of the office produced a commission, return, and examinations, delivered at the office, by an unknown party, and it was proved that it was the same commission that issued, and the signatures of the commissioners to the return were identified, this was held enough to make the examinations admissible without proof that they were the identical examinations sent forth by the commissioners. *S. C.* Where the deponent refers in his deposition to a former deposition of his, thus:—"I hand you a legalised copy of a deposition D. which I made at the English consulate, and which I now confirm," and the paper D. was annexed and purported to have been produced to the witness, yet the paper D. was held inadmissible. *Alcock v. R. Exchange Assurance Co.*, 13 Q. B. 292. As to the jurisdiction of a Court in India to examine witnesses, to which Court had been transferred the jurisdiction of the Court to which the commission was directed, see *Wilson v. Wilson*, 9 P. D., 8 C. A.

As to the use in evidence of depositions taken by a British Consul abroad, *vide post*, p. 191.

As to proof under the Bankers' Books Evidence Act, 1879, ss. 4, 5, by affidavit that a book is a banker's book and verification of a copy thereof, *vide ante*, p. 116.

EFFECT OF DOCUMENTARY EVIDENCE.

WE have already seen in what manner various written instruments of a public or private nature are to be proved. *Ante*, pp. 91 *et seq.* Under the present head will be collected some of the principal cases relating to the effect and authority of such instruments when duly proved, and the circumstances under which they are admissible evidence of the facts which they purport to show.

Where a document, inadmissible as evidence, has been in part read at the instance of counsel, he cannot afterwards object to the admissibility of the whole of it. *Laybourn v. Crisp*, 4 M. & W. 320.

Effect of Acts of Parliament.

The preamble of a public general act of parliament, reciting the existence of certain outrages, is evidence to prove that fact; because in judgment of law, every subject is privy to the making of it. *R. v. Sutton*, 4 M. & S. 532. But it seems that allegations of fact in a public statute are not conclusive; therefore a place, named as a borough or corporation in the Municipal Reform Act, may be proved not to be one. *R. v. Greene*, 6 Ad. & E. 548. Indeed, recitals in a private act are not conclusive either of fact or law. *R. v. Haughton*, 1 E. & B. 501; 22 L. J., M. C. 89. And a private statute, though it contains a clause requiring it to be judicially noticed as a public one, is not evidence at all against strangers, either of notice or of any of the facts recited. *Ballard v. Way*, 1 M. & W. 520; *Brett v. Beales*, M. & M. 421. *Taylor v. Parry*, 1 M. & Gr. 604. But it may be evidence of reputation respecting a franchise as between lords and tenants of a manor. *Carnarvon, El. of, v. Villebois*, 13 M. & W. 313. In *Beaufort, Dk. of, v. Smith*, 4 Exch. 450, a general saving in certain acts of the plaintiff's rights, including a right of toll on all coal exported within his manor, was considered to be inadmissible evidence of such claim in favour of the plaintiff. It is observable that in both the last cases, the rights saved were of a public nature; the acts were local and personal, public acts; and the savings were in the usual

form in such acts. In *Carnarron, El. of, v. Villebois, ante*, p. 178, the act was an inclosure act, to which the lord and copyholders were, as it were, parties, and the claim was of free-warren over copyholds. In *Beaufort, Dk. of, v. Smith, ante*, p. 178, the acts were harbour and canal acts.

Effect of Proclamations, Gazette, State Papers, &c.

The King's proclamation, being an act of state of which all ought to take notice (*per Treby, C. J., Wells v. Williams*, 1 Ld. Raym. 283), is evidence to prove a fact of a public nature recited in it, viz., that certain outrages had been committed in different parts of certain counties. *R. v. Sutton*, 4 M. & S. 532.

The Gazette is evidence of all acts of state published therein; as where it states that certain addresses have been presented to the King, it is evidence to prove that fact. *R. v. Holt*, 5 T. R. 436. So proclamations may be proved by production of the Gazette. *Ibid.* 443; *Att.-Gen. v. Theakstone*, 8 Price, 89; and see the Documentary Evidence Act, 1868, *ante*, p. 100. But the Gazette is not evidence (unless made so by statute) of matters therein contained which have no reference to acts of state, as a grant by the King to a subject of a tract of land or of a presentation; *R. v. Holt*, 5 T. R. 443; or of the appointment of an officer to a commission in the army; *Kirwan v. Cockburn*, 5 Esp. 233; *R. v. Gardner*, 2 Camp. 513. The statutory effect of the Gazette has been much extended by the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), and subsequent statutes: *vide ante*, p. 100, *et seq.*

A paper from the Secretary of State's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is evidence of the precise period of the commencement of that war. *Thelluson v. Costling*, 4 Esp. 266. The existence of a war between this country and another requires no proof. *Fost. Cr. L.* 219; *R. v. De Berenger*, 3 M. & S. 67. The articles of war, printed by the King's printer, are evidence of such articles; *R. v. Withers*, cited 5 T. R. 446; of which, it seems, the court will take judicial notice; *per Abbott, C. J., Bradley v. Arthur*, 4 B. & C. 304; *vide ante*, p. 80. By the Bankruptcy Act, 1883, s. 132, the Gazette is evidence, in some cases conclusive, of certain proceedings in bankruptcy stated therein, *vide post*, Part III., *Actions by Trustees of Bankrupts*.

Effect of Parliamentary Journals.

The Journal of the House of Lords, containing an address of the Lords to the King, and the King's answer, in which certain differences were stated to exist between the Kings of England and Spain, was admitted to prove the fact of such differences. *R. v. Francklin*, 17 How. St. Tr. 627; *R. v. Holt*, 5 T. R. 445. But the resolutions of either House of Parliament are not evidence of extrinsic facts therein stated; thus the resolution of the House of Commons, stating the existence of the Popish Plot, was held to be no evidence of that fact. *Oates' Case*, 10 How. St. Tr. 1165, 1167.

Effect of Judgments, &c., as Estoppels, or as Evidence.

Effect of judgments and verdicts in the superior courts, with regard to the parties. The judgment of a court of concurrent jurisdiction directly upon a point is, as a plea, a bar, and, as evidence, conclusive upon the same matter between the same parties; but it is also a general principle that a transaction between two parties in a judicial proceeding ought not to bind a third; for it would be unjust to bind any person who could

not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Therefore the depositions of witnesses in *another cause* in proof of a fact; the verdict of a jury finding a fact; and the judgment of the court on facts so found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. *Per De Grey, C. J., Kingston's (Ds. of) case*, 20 How. St. Tr. 538. The language of the judges on the first proposition enunciated above, has been thus explained, viz., that the judgment is conclusive (*i.e.*, an estoppel) if pleaded, where there is an opportunity of pleading it; but that where there is no such opportunity, then it is conclusive as evidence; but if the party forbears to rely upon an estoppel when he may plead it, he is taken to waive the estoppel, and to leave the prior judgment as evidence only for the jury. See 2 Smith's L. Cases, note on *Ds. of Kingston's case*. And this view [is confirmed by the opinion of the court in *Freeman v. Cooke*, 2 M. & W. 654; *Litchfield v. Read*, 5 Exch. 939; *R. v. Blackmore*, 2 Den. C. C. 419; *R. v. Haughton*, 1 E. & B. 501; 22 L. J., M. C. 89. See further as to the effect of a judgment as an estoppel, or as evidence only. *Outram v. Morewood*, 3 East. 365, and *Vooght v. Winch*, 2 B. & A. 662. Where the actual grounds of the judgment can be clearly discovered from the judgment itself, it is conclusive as to the grounds, as well as with reference to the actual matter decided. *Alison's case*, L. R. 9 Ch. 1, 25.

In order to bind a party, he must have sued or been sued in the same character in both suits. Thus, in an action against an executor suggesting a devastavit, he is estopped by a prior judgment against him finding assets. *Jewsbury v. Mummary*, L. R., 8 C. P. 56; Ex. Ch. See further, *post*, Part III. *Actions against executors*. But in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him as administrator on the same bond, but he may show the letters of administration repealed. *Robinson's case*, 5 Rep. 32 b. In considering the effect of judgments the court will, it seems, look to the real, and not only to the nominal parties to the suit. Thus a verdict in trespass against a person who justified as servant of J. S., was allowed to be given in evidence against the defendant, who also acted under J. S., J. S. being shown to be the real defendant in both causes. *Kinnersley v. Orpe*, 2 Doug. 517. Where, in a replevin suit between A. and the bailiff of B., it was found that A. was tenant of B., the judgment was received as conclusive evidence against A. of his tenancy in a suit by B. against A. for subsequent rent. *Hancock v. Welsh*, 1 Stark. 347. But where in trespass, *q. c. f.*, the defendant pleaded *lib. ten.* in P., and it appeared that P. had sold and conveyed to plaintiff, and afterwards conveyed, without a covenant of title, to defendant, who had mortgaged to P.: it was held that P. was a competent witness for the defendant, because the verdict would not be evidence for him as between him and the plaintiff. *Simpson v. Pickering*, 1 C. M. & R. 527. A former judgment in ejectment was evidence on another ejectment, where the lessor of the plaintiff and the defendant were the same. *Doe d. Strode v. Seaton*, 2 C. M. & R. 728. In ejectment on the demise of a mortgagee, a verdict and recovery in a former ejectment brought by the defendant against the mortgagor since the mortgage, is not evidence against the plaintiff. *Doe d. Smith v. Webber*, 1 Ad. & E. 119.

Where a party could not have been prejudiced by a verdict if it had gone against him, a verdict in his favour in a former action will not be available as evidence for him, even against one who was a party to it. *Wenman v. Mackenzie*, 5 E. & B. 447; 25 L. J., Q. B. 44. As to an action for damages being a bar to a second action in respect of the same matter, *vide post*, *Action for Nuisance.—Defence*.

Effect of judgments and verdicts in the superior courts with regard to privies.] Privies stand in the same situation as to those to whom they are privy. Thus, a privy in blood, as an heir, may give in evidence a verdict for, and is bound by a verdict against, his ancestor. *Lock v. Norborne*, 3 Mod. 141; *Outram v. Morewood*, 3 East, 346; *Whittaker v. Jackson*, 2 H. & C. 926; 33 L. J., Ex. 181. So, of privies in estate: therefore if there be several remainders limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder. *Pyke v. Crouch*, 1 Ld. Raym. 730. See *Doe d. Ld. Teynham v. Tyler*, 6 Bing. 390; *Doe v. Watts, Harlow*, 12 Ad. & E. 42 (d). But a verdict against tenant for life or years is inadmissible for or against the reversioner. B. N. P. 232; *Rees v. Watts*, 3 M. & W. 527; see *Wenman v. Mackenzie*, ante, p. 180; and the proposition to the contrary in Com. Dig. Testm. (A. 5), cannot be maintained. A verdict for or against A. is admissible against a party claiming under A. where the claim originated since the verdict. *Semb. per* Littledale, J., in *Doe d. Foster v. Derby*, El. of, 1 Ad. & E. 790. So, a verdict against one defendant, in case for a nuisance, is evidence of the plaintiff's right in a second action against the same and other defendants, if the latter claim under the first defendant. *Strutt v. Boringdon*, 5 Esp. 58. A. and B. sued defendant for diverting water from their works; they were allowed to give in evidence a former recovery by A. alone against the same defendant for a similar injury, although B. had been a witness for A. in the first action; and it was held that the possession by A. and B. of the same works was evidence of privity of estate. *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 133. Privity in law is sufficient; thus a verdict against an intestate or testator binds his representatives. *R. v. Hebden*, Andr. 389. In the same manner, a judgment against the schoolmaster of a hospital, concerning the rights of his office, is evidence against his successor. *Travis v. Chaloner*, 3 Gwill. 1237.

Effects of judgments and verdicts in the superior courts with regard to strangers.] There are several exceptions to the general rule that no one shall be bound or prejudiced by judgments to which he is not party or privy. They are admissible where they relate to public matters. Thus, in the case of customs or tolls, verdicts, whether recent or ancient, respecting the same custom or toll, are evidence between other parties. *London, City of, v. Clerke*, Carth. 181; B. N. P. 233. So in the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming the same right. *Per* Ld. Kenyon, *Reed v. Jackson*, 1 East, 357. So a verdict with regard to a public right of way. *Id.* 355. And it seems that in all cases where general reputation is evidence, a verdict upon the right claimed will also be evidence even as between strangers to the former record. *Id.*; so also where judgment went by default for want of a plea. *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P. See further, ante, pp. 47, 48. And a verdict may be evidence, though not delivered according to modern forms, if the record be old. Thus, where the Bishop of L. was presented in the sheriff's tourn for not repairing a bridge, and the presentment, being removed into K. B. by *certiorari*, was tried at *Nisi Prius*, 20 Edw. 3, the jury found that the bishop was not liable to repair, that the bridge was built by alms within sixty years, and that they knew of no one liable to repair: Held that, although the only material finding was the non-liability of the then defendant, yet it was not to be assumed that the functions of the jury were so limited *tempore* Edw. 3 as now, and that the record was evidence in favour of the defendant (a stranger to the record), who was charged with a prescriptive liability to repair *ratione tenuræ*; especially when followed by a grant of pontage by the same king, reciting

that no one was bound to repair the bridge. *R. v. Sutton*, 8 Ad. & E. 516. A judgment in favour of a lord of a manor on a *quo warranto* for usurping a franchise is evidence of the right even against copyholders of inheritance. *Carnarvon, El. of, v. Villebois*, 13 M. & W. 313. So, allowances *in eyre* as against strangers. *Per Parke, B., ib.* The record of a former action of *indebitatus assumpsit* for work and labour by an officer, coupled with oral proof of the point in issue, is evidence of the customary rights of a public corporate officer. *Laybourn v. Crisp*, 4 M. & W. 320. But the verdict in such cases is not conclusive. *Biddulph v. Ather*, 2 Wils. 23. And a prosecution by the Crown for usurping tolls resisted, and not carried on to judgment, is not admissible on a trial of the same right. *Per Tindal, C. J., Lancum v. Lovell*, 6 C. & P. 437.

A judgment of ouster against a municipal officer is evidence *inter alios* upon issue joined in a *quo warranto* whether he was such officer at the time of defendant's election. *R. v. Hebden*, 2 Stra. 1109; S. C., more fully in 2 Selw. N. P. 13th ed. 1136. And the record of ouster will be conclusive if the ouster avoids the election and the judgment was without fraud. *R. v. York, Mayor of*, 5 T. R. 66, 72; otherwise not. 2 Selw. *ubi supra*; *R. v. Grimes*, 5 Burr. 2598. Such judgments are in the nature of judgments *in rem*. See *post*, pp. 183, 184.

Where a judgment is produced merely for the purpose of proving the fact of such recovery and judgment, and not with a view to prove the truth of the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus, a verdict against a master in an action for the negligence of his servant is evidence in an action by the master against the servant to prove the amount of damages, though not of the fact of the injury. *Green v. New River Co.*, 4 T. R. 590. Plaintiff became surety for a collector on having an indemnity bond from defendant. In an action on it, the breach was, that the plaintiff had been forced to pay a large sum in consequence of the collector's default, and the issue was on a traverse of the plaintiff's being forced to pay it. On the trial a judgment for 500*l.* recovered without contest against the plaintiff as surety was given in evidence: held that the judgment could not be used as evidence to show the amount which the plaintiff had been forced to pay; the amount for which the collector was liable ought to have been shown as against the defendant. *King v. Norman*, 4 C. B. 884.

The proceedings and verdict of the jury in a suit in the Divorce Court are not admissible in evidence in an action *inter alios*, unless there has been a sentence altering the *status* of the parties to the suit. *Needham v. Bremner*, L. R., 1 C. P. 583.

Effect of judgments and verdicts with regard to the subject-matter of the suit. A judgment between the same parties and upon the same cause of action is conclusive, although the *form* of action is different. Thus, a verdict in trover is a bar in an action for money had and received, brought for the value of the same goods. *Hitchin v. Campbell*, 2 W. Bl. 827. So a judgment in debt is a bar in an action of *assumpsit* on the same contract. *Slade's case*, 4 Rep. 94 b. So a judgment in trespass, in which the right of property is determined, is a bar to trover for the same taking. Com. Dig. Action (K. 3). But if the party mistakes his form of action and fails on that account, the judgment in such action will not conclude him. *Ferrers v. Arden*, Cro. Eliz. 668; *Godson v. Smith*, 2 B. Moore, 157. If the plaintiff omitted to give any evidence of a claim under a general count in a former action, in which he might have recovered the amount, he was not precluded from giving it in a subsequent action. *Seddon v. Tutop*, 6 T. R. 697; and see *Eastmure v.*

Lawes, 5 N. C. 444 ; *Thorpe v. Cooper*, 5 Bing. 116, Ex. Ch., and the observations of the court in *Henderson v. Henderson*, 3 Hare, 115. See also *Widgery v. Tepper*, 7 Ch. D. 423. So, although an order of removal quashed at the sessions, is evidence between the same parishes that there is no settlement in the appellant parish, yet a subsequent cause of removal may be shown. *R. v. Wick St. Lawrence*, 5 B. & Ad. 526. Where the declaration in the second action was framed in such a manner that the causes of action *might* be the same as those of the first, it was incumbent on the party bringing the second action to show that they were not the same. *Bagot, Ltd., v. Williams*, 3 B. & C. 239.

It is a general rule that a judgment is only evidence where it is direct upon the point which it is offered in evidence to prove. It has been denied to be evidence of any matter which came collaterally in question ; or of any matter incidentally cognisable ; or of any matter to be inferred by argument from the judgment. *Kingston's (Ds. of)*, case, 20 How. St. Tr. 533 ; *Blackham's case*, 1 Salk. 290. It seems, however, that this rule, as laid down in the above terms, has not been strictly adhered to, and requires qualification. Thus, in settlement cases, an order of removal, unappealed against or confirmed, has been always held to be conclusive evidence not merely of the fact directly denied, but also of those facts which are necessary to arrive at the decision ; any fact on which the judgment of the court *must* have been based cannot be considered as merely collateral. *R. v. Hartington*, 4 E. & B. 780, 790 ; 24 L. J., M. C. 98, and the cases there referred to. A verdict with judgment is not evidence of an immaterial allegation, although included in a general traverse. *Shearm v. Burnard*, 10 Ad. & E. 593.

As to judgments *in rem*, and their effect as against strangers, see the next head.

Effect of Judgments *in rem*.

There are various legal proceedings, not being suits *inter partes* merely, which bind all mankind, until set aside in due course. The most remarkable examples occur in proceedings brought on the revenue side of the Court of Exchequer *in rem* ; by revenue officers ; in the Courts of Admiralty, in the Courts for Probate and Divorce, and in the Spiritual Courts. Instances of some of those will be given under future heads. Judgments for the Crown on *scire facias* for the repeal of patents (*vide post*, p. 184), and informations in the nature of *quo warranto* for seizure of franchises, or ouster from offices, are also of the same nature. A judgment of condemnation of goods in the Exchequer, upon a proceeding *in rem*, is conclusive as to all the world ; and therefore, after such judgment, trespass will not lie against the officer who seized the goods to try the point again. *Scott v. Shearman*, 2 W. Bl. 977. But if the proceeding was *in personam* merely, as a conviction for penalties, the judgment is not evidence (except of the fact of conviction) in any case in which the parties are different. *Hart v. M'Namara*, 4 Price, 154 n. A conviction by commissioners of excise on an information for an offence against the excise laws, is conclusive ; *Fuller v. Fotch*, Carth. 346 ; and binds a stranger. *Roberts v. Fortune*, Hargr. Law Tracts, 468 n. It has been said that an acquittal in the Exchequer upon a seizure made for want of a permit is conclusive evidence in an action of trespass that the permit was regular ; *per* Ld. Kenyon, *Cooke v. Sholl*, 5 T. R. 255 ; Vin. Ab. Evid. (A. b. 23) ; but this opinion has been questioned ; for the acquittal does not, like a conviction, ascertain any precise fact, and may have proceeded on the ground of insufficient evidence. 1 Phill. Ev. 338. A conviction *in rem* was evidence,

though obtained by the evidence of the very party who used it. *Davis v. Nest*, 6 C. & P. 167.

By the J. Act, 1873, s. 34, the jurisdiction of the revenue side of the Court of Exchequer was vested in the Exchequer Division of the High Court of Justice, and that of the Admiralty, and of the Probate and Divorce Courts in the Probate, Divorce, and Admiralty Division. The Exchequer Division was merged in the Queen's Bench Division of the High Court by Order in Council made 16th December, 1880, under the J. Act, 1873, s. 32.

The Patents, &c. Act, 1883, 46 & 47 Vict. c. 57, s. 26, now substitutes a petition to revoke letters patent for an invention, for proceedings by *scire facias*.

When a judge has, under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), tried an election petition, his certificate under sect. 11, sub-sect. 13, as to who is duly elected, is a decision *in rem* and conclusive. *Waygood v. James*, L. R., 4 C. P. 361. But his report under sub-sect. 14, 16, has not this effect. *Stevens v. Tillet*, L. R., 6 C. P. 147.

A judgment *in rem* of a competent foreign tribunal is conclusive, and cannot in the absence of fraud be questioned in our courts. *Cammell v. Sewell*, 3 H. & N. 617; 27 L. J., Ex. 447; affirmed on another ground in 5 H. & N. 728; 29 L. J., Ex. 350, Ex. Ch.; *Castrigue v. Imrie*, 8 C. B., N. S. 405; 30 L. J., C. P. 177, Ex. Ch.; L. R., 4 H. L. 414; *Castrigue v. Behrens*, 3 E. & E. 709; 30 L. J., Q. B. 163. A foreign sentence of condemnation is not evidence of capture, but after other proof of capture it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 Camp. 69.

Effect of Verdicts.

The *postea* was evidence of a trial had. See cases cited, *ante*, p. 104. But the *Nisi Prius* record alone was no evidence of it without the *postea* indorsed. *Ibid.* As between co-plaintiffs or co-defendants for contribution, the *postea* was proof of the damages recovered without proof of the judgment, but not of the costs of suit; *Foster v. Compton*, 2 Stark. 365; and if the verdict and damages be entered generally, oral evidence is admissible to explain on which count the damages were given; *Preston v. Peeke*, 27 L. J., Q. B. 424. And a *postea* has been received to prove a set-off to the extent of the verdict in a subsequent action between the same parties. *Garland v. Scoones*, 2 Esp. 648.

The analogous practice under the J. Acts is stated, *ante*, p. 104; from this it appears that the certificate of the associate or master will take the place of the *postea*.

Effect of Writs.

The production of a writ, with the sum indorsed, was evidence of the amount for which the arrest was made. *Brown v. Dean*, 5 B. & Ad. 848. When commissions of bankruptcy used to be issued, a writ superseding the commission was held evidence both of the fact of the commission, and of the date of it as recited, in an action by the assignees. *Gervis v. Gd. W. Canal Co.*, 5 M. & S. 76; *Ledbetter v. Salt*, 4 Bing. 623, 626. So, in case of a *fiat*. *Wright v. Colls*, 8 C. B. 150. A writ of execution is evidence for the sheriff or his vendee, as against the execution debtor, without producing the judgment; but not against strangers. *Doe d. Batten v. Murless*, 6 M. & S. 110. Nor is it evidence for the sheriff's vendee, if he be the execution creditor. *Doe d. Bland v. Smith*, Holt, N. P. 589.

Effect of Inquisitions, &c.

Although an inquisition taken before the coroner *super visum corporis* was formerly considered conclusive evidence of the fact found by it against the executors or administrators of the deceased; 3 Inst. 55; it is now held that everything done under it is traversable. *Per Cur. in Garnett v. Ferrand*, 6 B. & C. 611; 1 Wms. Saund. 362, *et seq.* (1).

An inquisition finding lunacy is evidence of it against third persons, though not conclusive. *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *Frank v. Frank*, 2 M. & Rob. 314, 315 n. So inquests of office duly taken under legal commissions (*ante*, p. 105) are evidence between third parties. Thus, inquisitions *post-mortem* are admissible evidence of the facts found by them. *Rowe v. Brenton*, 3 M. & Ry. 141, 142. An inquisition *post-mortem* reciting a conveyance in *hæc verba* is evidence of it for a party who claims title under it. *Burridge v. Sussex, El. of*, 2 Ld. Raym. 1292; *Accord. per Parke, B., in Wood v. Morewood*, Derby Sum. Ass. 1841. So an inquisition taken after the attainder of A. finding of what lands he was seised, are evidence of A.'s seisin as against strangers. *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P. So, an extent of Crown lands in the Exchequer, taken in pursuance of 4 Edw. 1, stat. 1, is evidence of the matters returned in it; *Rowe v. Brenton*, 3 M. & Ry. 164; or an extent of lands purchased by the Crown of a subject purporting to be made by a steward of the Crown, and found in the land revenue office. *Doe d. William 4 v. Roberts*, 13 M. & W. 520. So, the returns of inquisitions taken by special commissions, *temp.* Edw. 1, called the Hundred Rolls. S. C. *Id.* 140. Old returns by a bishop to a writ out of the Exchequer, inquiring of presentations and vacancies of livings in his diocese, are evidence, even in favour of his successors. *Irish Society v. Derry, Bp. of*, 12 Cl. & Fin. 641. But a document, *tempore* Eliz., produced from the office of the duchy of Lancaster, purporting to be a survey of a duchy manor taken by the deputy surveyor-general by the oaths of 20 tenants of the manor whose names were subscribed, was held inadmissible evidence of the bounds of the manor, there being no proof of the authority under which the survey was taken, and, consequently, no ground for presuming that any such survey was in fact made. *Evans v. Taylor*, 7 Ad. & E. 617. If indeed the document had been generally accepted as a general presentment, it would have been evidence of reputation, *semb.* S. C. An inquisition under a commission from the Court of Exch. to inquire whether a prior or the Crown, after the dissolution of the priory, was seised of certain lands as parcel of a manor, was held to be admissible, but not *conclusive*, evidence of the facts stated in the return. *Tooker v. Beaufort, Dk. of*, 1 Burr. 146; *Sayer*, 297. So, the surveys of the church and Crown lands, taken by commissioners under the authority of Parliament during the Commonwealth, are admissible in evidence. *Underhill v. Durham*, 2 Gwill. 542; *Rowe v. Brenton*, 3 M. & Ry. 359. And other surveys taken by commissioners during the same period may be evidence of reputation, even though not taken by competent authority. *Freeman v. Read*, 4 B. & S. 178; 32 L. J., M. C. 226. A document purporting to be a survey of a manor while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, is admissible as evidence of the boundaries and customs of the manor. *Smith v. Brownlow, Ld.*, L. R., 9 Eq. 241.

But inquisitions or surveys made by private lords of manors are not evidence as such on behalf of those claiming under them. Thus a private survey, by direction of Oliver Cromwell, A.D. 1650, of lands granted to him

by the Parliament, in which commissioners named by him stated the substance of information received from presentments of the tenants as to manorial tolls and royalties, was not evidence either as reputation of tenants or a public document. *Beaufort, Dk. of, v. Smith*, 4 Exch. 450. So, a private survey was rejected on a question of parcel, or no parcel, of a lordship. *Daniel v. Wilkin*, 7 Exch. 429; 21 L. J., Ex. 236. So, where a manor formerly belonged to the Crown, an ancient grant, and survey of it recorded in the augmentation office, is not evidence for the tenants against their lord. *Phillips v. Hudson*, L. R., 2 Ch. 243.

The *valor beneficiorum*, or Pope Nicholas's taxation, is a document of the same nature as the above-mentioned public documents, and is admissible to prove the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate ecclesiastical benefices. *Bullen v. Michel*, 2 Price, 477. But it is of no value to show whether tithes were then taken in kind, or by a modus. *Short v. Lee*, 2 J. & W. 486; 2 Eagle on Tithes, 409, 418. A new *valor beneficiorum*, was made, 26 Hen. 8, by virtue of commissions under the great seal, and the surveys under these commissions are admissible to prove the value of the first-fruits and tenths of ecclesiastical promotions at that period, though they are not conclusive. *Drake v. Smyth*, 5 Price, 377; *Bullen v. Michel*, 4 Dow, 324. A return to inquiries sent by the bishop upon the augmentation of a living by Queen Anne's bounty is in the nature of a public inquisition, and admissible. *Carr v. Mostyn*, 5 Exch. 69.

Domesday-book, being a record compiled by the authority of the government and founded on official returns made *temp.* Will. 1, is admissible evidence of the tenure of land, &c.; and where a question arises whether a manor is "terra regis" or ancient demesne, the trial is by inspection of Domesday. Gilb. Ev. 69.

Sheriffs', bailiffs', receivers', and other ministers' accounts of Crown lands, deposited in the public record offices (as the land revenue office or Exchequer), are evidence of the title of the Crown. *Doe d. William 4. v. Roberts*, 13 M. & W. 520, 523, 524. It has, indeed, been questioned whether they are admissible if the accountant be living. *Ib.* 524, n. But such accounts seem to stand on a different footing from ordinary accounts (*ante*, pp. 57, *et seq.*), which are not admissible unless the accountant is dead. They are rendered by officers of the Crown, and checked, audited, and enrolled or deposited among the public records, and their authority seems to be independent of the oral testimony of any officer, who, though he may be responsible to the Crown, would probably be personally unable to verify the details of his account.

On account of the interest of the Crown in the Duchy of Cornwall, records of acts affecting its possessions are considered as of a public nature; and on this ground a document, purporting to be a caption of seisin to the use of the first duke by persons assigned by the letters patent to take seisin, found in the Exchequer, and enumerating the possessions of which seisin was then given to the Black Prince, was admitted as evidence not only of seisin, but also of what things the prince had seisin. *Rowe v. Brenton*, 8 B. & C. 743; S. C., 3 M. & Ry. 156.

An inquisition by a sheriff's jury to ascertain the value of property for the information of the sheriff is not, as it seems, admissible evidence of property even against the sheriff; *Latkow v. Eamer*, 2 H. Bl. 437; nor is it evidence in his favour; *Glossop v. Pole*, 3 M. & S. 175; unless, perhaps, where the question is whether the sheriff has acted maliciously. *Id.*

An inquisition by a sheriff's jury to assess compensation to a landowner under the Lands Clauses Consolidation Act, 1845, s. 68, is conclusive as to

the amount of, but not as to the right to, such compensation; *R. v. L. & N. W. Ry. Co.*, 3 E. & B. 443; 23 L. J., Q. B. 185; *Chapman v. Monmouthshire Ry. and Canal Co.*, 2 H. & N. 267; 27 L. J., Ex. 97; *Read v. Victoria Station and Pimlico Ry. Co.*, 1 H. & C. 826; 32 L. J., Ex. 167; *Rickett v. Metropolitan Ry. Co.*, L. R., 2 H. L. 175; and see *Barber v. Nottingham and Grantham Ry. Co.*, 15 C. B., N. S. 726; 33 L. J., C. P. 193. If the jury give damages in respect of injury which does not entitle the claimant to compensation, their verdict is altogether bad. *Re Penny*, 7 E. & B. 660; 26 L. J., Q. B. 225. See *Beckett v. Midland Ry. Co.*, L. R., 1 C. P. 241, 246.

Effect of Rules or Orders of Court.

The allegation of a fact in an order (formerly called a rule) *nisi* is not evidence of it for the party at whose suggestion it is obtained. *Woodroffe v. Williams*, 6 Taunt. 19. A rule, making a judge's order a rule of court, was evidence of the order. *Still v. Halford*, 4 Camp. 17. A rule purporting to be granted on the motion of a certain counsel, has been admitted as evidence of the attendance of that counsel in court at the date of the rule. *Heath's case*, 18 How. St. Tr. 176. An allegation in a count that defendant procured a defective security which was set aside by a rule of court was held not proved by merely producing the rule without other proof of the security. *Compton v. Chandless*, 4 Esp. 18.

Effect of Proceedings in Chancery.

Bill in Chancery.] Notwithstanding former opinions to the contrary, it is now settled that a bill in Chancery is not generally admissible in evidence, further than to show that such a bill did exist, and that certain facts were in issue between the parties. *Doe d. Bouverman v. Sybourn*, 7 T. R. 2, 3; *Boileau v. Rutlin*, 2 Exch. 665; *Banbury Peerage case*, 1 Selw. N. P. 13th ed. 677. The ground of this exclusion is that, together with statement of facts, a bill usually also contains allegations made with no other object than to obtain a discovery on the oath of the defendant. It is equally inadmissible as evidence, though read at the requisition of the opposite party; thus in a case in which the plaintiff gave in evidence the answer of defendant to a bill in equity filed by a third party, Tindal, C. J., ruled that although the defendant was entitled to have the bill also read as explanatory of the answer and as part of the plaintiff's case, the jury were not to consider the statements in the bill as evidence of the facts stated. *Pennell v. Meyer*, 2 M. & Rob. 98, *ante*, p. 107. So, where the lessor of the plaintiff in ejectment, upon a notice to quit signed by a receiver in Chancery, put in the bill and answer in the suit in which the receiver was appointed, for the purpose of proving the regularity of the appointment, the court held that a statement in the bill admitted in the answer, could not be read by the defendant for the purpose of showing that the legal estate was not in the lessor of the plaintiff. *Parsons, Lessee of, v. Purcell*, 12 Ir. L. R. 90. In an action of trespass to a several fishery brought by the lessee of a grantee, A., of the fishery, a bill and answer in a suit instituted long before by another grantee, B., against A., in which the limits of the fishery were described, were held admissible in evidence as part of the history of the fishery and of the claims to it. *Malcolmson v. O'Dea*, 10 H. L. C. 593.

Answer.] An answer in Chancery is good evidence against the defendant

as an admission on oath, and must all be taken together. Therefore, if upon exceptions taken a second answer has been put in, that also must be read. B. N. P. 237. But it has been said that where one party reads part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and he does not thereby admit, as evidence, facts which may happen to be stated in it by way of hearsay only; *obiter per* Chambre, J., *Roe d. Pellatt v. Ferrars*, 2 B. & P. 548; but see note, *Id.*; and *ante*, p. 75.

The answer of a guardian is no evidence against an infant. B. N. P. 237. As to the answer of a trustee as against a *cestui que trust*, and conversely, see *ante*, pp. 64, 65. But an answer will be evidence against privies: thus, an answer in a suit for tithes instituted by a vicar against the owners of lands in the parish, in which answer the defendants declared the tithes to belong to the rector, will be evidence in an action for tithes by a succeeding rector against owners of the same lands. *Dartmouth, Ly., v. Roberts*, 16 East, 334. An answer by one who has sold an advowson, filed after the conveyance, is not admissible against a party claiming under the grant. *Gully v. Exeter, Bp. of*, 5 Bing. 171. See cases, *ante*, p. 57. The answer of one defendant is not evidence against a co-defendant; *Wyck v. Meal*, 3 P. Wms. 311; but after evidence has been given to connect two persons as partners, the answer of one will be evidence against the other; *Grant v. Jackson*, Peake, 203. See further *tit. Admissions*, *ante*, p. 68.

[*Decree or decretal order.*] A decree in equity may be given in evidence between the same parties, or any claiming under them. B. N. P. 243. It is evidence, but not conclusive, against the defendant of every fact stated, whether by way of assertion or denial. *Percival v. Caney*, 4 De G. & S. 610. Where the parties to an action respectively sue and defend on behalf of themselves and a multitude of others in the same interest on each side, a decision in the action binds them all as to the general right claimed in the action, *e.g.*, a right of common. *Commissioners of Sewers v. Gellatly*, 3 Ch. D. 610. A decree is even evidence as against parties not privy to it for some purposes; thus, on a trial touching the title to land, decrees between former litigants were admitted for the defendant to show how, and in what character, he came into possession under them, although the plaintiff did not claim under any party to the suits. *Davies v. Lowndes*, 1 N. C. 606; S. C. on error, 6 M. & Gr. 471. So it is evidence where hearsay is admissible: thus a decree in favour of a public officer, founded on an issue, is evidence of the right to exercise the office; and by such evidence the deputy oyster-meters of London established their exclusive rights within the port of London. *Laybourn v. Crisp*, 4 M. & W. 320. And a decree for payment of tithe in kind in a suit by the incumbent against the *occupiers* of land who set up a district modus, is evidence, but not conclusive evidence, for him in an issue (under 6 & 7 Will. 4, c. 71) between him and the landowners to try a manorial modus. *Croughton v. Blake*, 12 M. & W. 205. In a suit for tithe by ecclesiastical impropiators, in which the defendant set up a district modus, the answer of the predecessors of the plaintiff in a suit to establish a *farm* modus, in which answer the defendants set up a *district* modus, was held evidence against them, although the suit was *inter alios*. *Whelpdale v. Milburn*, 5 Price, 485. A decree against the lord of a manor, establishing customs, is evidence against a succeeding lord. *Price v. Woodhouse*, 3 Exch. 616. Where a decree in a possessory suit brought by C. was inconsistent with a public right of fishing, the proceedings were, in an action brought, by C.'s successor in title against strangers, held to be evidence to negative such

right. *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P. But an interlocutory order, made to quit possession *pendente lite*, is *not* evidence of reputation. *Pim v. Curell*, 6 M. & W. 234. The decree of an unauthorised court of equity is inadmissible either as an award (for want of submission) or as reputation. *Rogers v. Wood*, 2 B. & Ad. 245. See *ante*, p. 49. An order for an attachment for non-payment of the costs in a suit in equity is in itself *prima facie* evidence that a suit has been pending there. *Blower v. Hollis*, 1 Cr. & M. 393.

As to the effect of issues out of Chancery, see *Robinson v. Duleep Singh*, 11 Ch. D. 798, C. A.

The jurisdiction of the Court of Chancery was transferred by the J. Act, 1873, s. 16, to the High Court of Justice.

Effect of Depositions and Examinations in other Suits.

Though evidence must generally be given *viâ voce* on oath and in the very cause in which the witnesses are sworn, yet the testimony of witnesses so taken in another cause between the same parties, upon the same issue, is admitted where their personal attendance cannot be procured. Thus, where a witness was examined in a former action on the same point between the same parties, his testimony may be proved, if he is since dead; *B. N. P.* 242; or if he appears to be kept away by contrivance; *Green v. Gatewick*, *ib.* 243. It seems to be enough if the parties to the two actions are substantially though not nominally the same: as where the lessor of the plaintiff in the second was joined with other lessors in the first action. *Wright v. Doe d. Tatham*, 1 Ad. & E. 18, 19; *Att.-Gen. v. Davison*, M'Cl. & Y. 60, Ex. Ch. So if the parties and the title in issue are the same, the evidence is admissible, though the land sought to be recovered is different. *Doe d. Foster v. Derby*, *El. of*, 1 Ad. & E. 791 n. But where the parties are neither the same, nor in privity with each other, such testimony is not admissible, though the title and one of the parties may be the same. *S. C. id.* 783; *Morgan v. Nicholl*, L. R., 2 C. P. 117. The admissibility of this evidence seems to turn rather on the right to cross-examine than upon the precise identity, either of the parties or the points in issue in the two proceedings. See 1 Taylor, Evidence, § 436, and cases there cited. The former testimony must be proved either by the judge's notes, or by the evidence of a person who can repeat the words of the witness. *Evans v. Donisthorpe*, 1 Phill. Ev., Part 1, ch. 7, § 7; *Doncaster, Mayor of, v. Day*, 3 Taunt. 262; *Crease v. Barrett*, 1 Tyr. & Gr. 112. So, depositions in Chancery may be given in evidence in an action at law on the same matter between the same parties or their privies, where the witness is dead or cannot be found. *B. N. P.* 239; *Llanover, Ly., v. Homfray*, 19 Ch. D. 224, C. A. But they are not evidence of the facts contained in them against a person who does not claim under a party in the suit. *B. N. P.* 239. Where depositions were taken under a commission issued on a bill to perpetuate filed against the attorney-general on a petition of right, they were admitted as evidence against the Crown on the trial of a traverse of the inquisition taken on such petition. *De Bode's case*, 8 Q. B. 208.

In some cases such depositions are evidence even *inter alios*. Thus depositions relating to a question upon which hearsay would be good evidence, may be read against a person who was no party to the former suit. *B. N. P.* 239, *ante*, pp. 45, 49. So a deposition, taken in a cause between other parties will be admitted to be read, to contradict what the same witness swears at a trial; *B. N. P.* 240; and it will, of course, be evidence in any cause against the deponent himself. The deposition of a witness, taken to

perpetuate memory, was not admissible merely because he had since become interested; for it is taken only to prevent the loss of his testimony by death. *Tilley's case*, 1 Salk. 286. See further as to depositions taken on bills to perpetuate testimony and examinations, *de bene esse, ante*, p. 108.

In *Johnson v. Ward*, 6 Esp. 47, where the defendant moved to put off the trial upon an affidavit made by D., wherein D. swore that he had subscribed a policy for and on account of the defendant, this affidavit was received as evidence of the agency of D. In *Brickell v. Hulse*, 7 Ad. & E. 454, an action of trover against the sheriff, the affidavit of one W., used by the sheriff in order to obtain an interpleader rule, in which W. swore that he was the officer of the sheriff, was received. In *Gardner v. Moul*, 10 Ad. & E. 464, an action by the assignees of a bankrupt, the plaintiffs, in order to prove the act of bankruptcy, were allowed to put in evidence a deposition made by one H., whom the defendant had sent to prove the act of bankruptcy at the opening of the fiat. In *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J., C. P. 161, an action of trover was brought against a company, who had previously filed a bill for specific performance of a contract of sale, and upon the suit being referred to the master the company had made use before him of the affidavit of one D., in which he stated that he was the manager of the company at certain works: the affidavit was received in the action as an admission of the agency of D. In *Atkins v. Humphreys*, 1 M. & Rob. 523, at the trial of an issue directed by the Court of Chancery, depositions used by the defendants in a previous suit where also they were defendants, but where there was a different plaintiff, were rejected by Tindal, C. J., upon the ground of the difference in the parties. The decision in this case can hardly be reconciled with the later authorities, for when depositions are put in evidence as admissions, this identity between the parties is not necessary. The court, in the cases of *Brickell v. Hulse* and *Gardner v. Moul*, *supra*, appear to have been under the impression that depositions in Chancery taken under the old system (before November, 1852) could not be received as admissions, upon the supposition that the depositions were sealed up from the time of their being taken until publication had passed; but in the case of *Richards v. Morgan*, 4 B. & S. 641; 33 L. J., Q. B. 114, this error was pointed out and explained by the court. In that case depositions used by the vendee of an estate in a suit in Chancery commenced against him for the purpose of setting aside the sale, and containing statements as to the extent of the land, were received (*dis. Blackburn, J.*) in a subsequent action as admissions of the extent of the estate in question. So, in *Fleet v. Perrins*, L. R., 3 Q. B. 536, the answers to interrogatories made in a former action by one of the parties was held to be admissible as evidence against him.

In trespass *q. c. f.* defendant denied the possession of the plaintiff, and put in evidence the examination of A. B., then living, but abroad, who had been called by the plaintiff to prove possession in a previous summary proceeding for malicious trespass by plaintiff against defendant, but who on such examination had denied the plaintiff's possession: it was held that the deposition was admissible. *Cole v. Hadley*, 11 Ad. & E. 807. This unsatisfactory case is shortly reported, and the grounds of the judgment do not distinctly appear. It has been suggested that the evidence "was received as the deposition of a witness on a prior inquiry between the same parties on the same question; *Boileau v. Rutlin*, 2 Exch. 680, *per cur.*; but, even if this were the reason, a proceeding for conviction of an offence can hardly be considered as a cause between the same parties as a subsequent action of trespass; *vide post*, p. 195. See further *R. v. Latchford*, 6 Q. B. 567, and the judgment in *Boileau v. Rutlin*, *supra*.

Where the plaintiff in an action for goods sold had used an affidavit in another proceeding, erroneously alleging payment of the debt by the defendant to the plaintiff's agent, it was held that he was not estopped from suing the defendant, if the debt was not really paid. *Morgan v. Couchman*, 14 C. B. 100; 23 L. J., C. P. 36.

Even a voluntary deposition may be evidence as an admission of the party making it, on mere proof of signature. B. N. P. 238.

With regard to depositions taken under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), see sect. 136, cited *post*, Part III., *Actions by trustees of bankrupts*.

Depositions previously made before a British consul abroad, in relation to the same subject-matter, are admissible in evidence, on proof that the witness cannot be found in the United Kingdom; 17 & 18 Vict. c. 104, . 270.

Effect of Sentences in the Ecclesiastical and Divorce Courts.

While the Ecclesiastical Courts had the exclusive right of deciding directly upon the legality of marriage, the temporal courts received their sentences upon such questions as conclusive evidence of the fact (*Bunting v. Lepingwell*, 4 Rep. 29 a), upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same matter coming incidentally in question in another court for a different purpose, unless impeached for fraud. *Kingston's (Ds. of) case*, 20 How. St. Tr. 538, 540. See the cases cited *arguendo*, in *Stockdale v. Hansard*, 9 Ad. & E. 62. The jurisdiction of the Ecclesiastical Courts in these matters was transferred to the Court for Matrimonial Causes, and has been again transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. The verdict of a jury in a divorce suit is not evidence *inter alios*, where there has been no decree. *Needham v. Bremner*, L. R., 1 C. P. 583. But where the jury have found the petitioner guilty of adultery the verdict is conclusive evidence against him in a subsequent divorce suit, brought by him against a different co-respondent. *Conradi v. Conradi*, L. R., 1 P. & M. 514. A sentence in a suit of jactitation of marriage is evidence in an action at common law to disprove the marriage. *Jones v. Bow*, Carth. 225. In the last-mentioned case such sentence was held to be *conclusive* evidence; but on this point the authority of the decision has been overruled: for a sentence in a suit of jactitation has only a negative effect, *viz.*, it shows that the party has failed in his proof, leaving it open to new proofs of the same marriage in the same cause, and it does not conclude even the court which pronounces it. *Kingston's (Ds. of) case*, 20 How. St. Tr. 543. See *Blackham's case*, 1 Salk. 290, and Hargr. Law Tr. 451. A sentence of nullity of marriage may be impeached by proving that it was procured by fraud and collusion. *Harrison v. Southampton, Mayor of*, 4 D. M. & G. 137; 22 L. J., Ch. 722. *Acc. In re Birch*, 17 Beav. 358. A personal answer in a suit for tithes by a former rector is admissible against his successor in support of a modus. *Taylor v. Cook*, 8 Price, 664. As to the effect of the sentence of consecration of ground, see *R. v. Twiss*, L. R., 4 Q. B. 407, 412; and *Campbell v. Liverpool, Mayor of*, L. R., 9 Eq. 579.

Effect of Probate and Letters of Administration.

The Ecclesiastical Courts had formerly the exclusive right of deciding directly on the validity of wills of personalty, and on the granting of admi-

nistration. *Noell v. Wells*, 1 Lev. 235. This jurisdiction was transferred to the Court of Probate, and has, by the J. Act, 1873, s. 16, been again transferred to the High Court of Justice, and is by sect. 34 assigned to the Probate, Divorce, and Admiralty Division. See *Pinney v. Hunt*, 6 Ch. D. 98. A probate, therefore, granted by a competent court, is conclusive of the validity and contents of such a will and the appointment of executors till it is revoked, and no evidence can be admitted to impeach it, except in proceedings in the Probate Division for its revocation. *Allen v. Dundas*, 3 T. R. 125; *Meluish v. Milton*, 3 Ch. D. 27, C. A.; see *Pinney v. Hunt*, *supra*. On this ground the payment of money to an executor, who has obtained a probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null. *Allen v. Dundas*, *supra*. See Hargr. Law Tracts, 459. But administration may be impeached by proof that the value required a higher stamp. See *Stamps—Probate*, *post*, p. 250. Letters of administration are not evidence of any fact which is matter of inference and not of adjudication, as the intestate's death, for the grant assumes the fact of death. *Thompson v. Donaldson*, 3 Esp. 63; *accord. Moons v. De Bernales*, 1 Russ. 301, 306. Though it could not be shown in a court of common law that the Ecclesiastical Court had erred in granting probate, yet evidence might be given to show that the court had no jurisdiction; as that the supposed intestate was alive. *Allen v. Dundas*, 3 T. R. 130. So the letters of administration might be proved to have been revoked. *B. N. P.* 247. And the books of the Prerogative Office are evidence of the revocation. *R. v. Ramsbottom*, 1 Leach, C. C. 25, n. So, it may be shown that the seal of the ordinary has been forged; but it cannot be shown that the will was forged, or that the testator was *non compos mentis*, or that another person was appointed executor; *B. N. P.* 247; *Noell v. Wells*, 1 Lev. 236; for those questions are settled by the judgment of the court.

A probate, we have seen, is not, except under special circumstances, evidence of a will of real property, *ante*, pp. 135, 140, 141; nor is it generally evidence that an instrument is a will so as to pass copyhold or customary estates; *Hume v. Rundell*, Madd. & Geld. 331; or to operate as an execution of a power to charge land. *S.C. ib.* We have seen, *ante*, p. 44, that it is *not* primary evidence in cases of pedigree to prove relationship.

As to the effect of probate in the case of a will of land, see the provisions of 20 & 21 Vict. c. 77, stated *ante*, pp. 140, 141.

The other provisions of that Act, relating to the effect of probate generally will be found *post*, Part III., *Actions by executors*.

Effect of Sentences in Admiralty Courts.

Upon questions of prize the Court of Admiralty has exclusive jurisdiction; therefore a sentence of condemnation in that court is conclusive, and being a proceeding *in rem*, it binds all the world. *Kinnersley v. Chase*, Park Ins. 8th ed. 743. The jurisdiction of the Court of Admiralty has been transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. And the sentence of a foreign Court of Admiralty is also, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 Show. 232; *Bolton v. Gladstone*, 5 East, 155. But the sentence of a Court of Admiralty, sitting in contravention of the law of nations, will not be recognised in our courts. *Havelock v. Rockwood*, 8 T. R. 268. If the property is condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact.

Barzillay v. Lewis, Park Ins. 8th ed. 725. So, where no special ground is stated, but the ship is condemned generally as good and lawful prize, it is to be presumed that the sentence proceeded on the ground of property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Saloucci v. Woodmass*, Park Ins. 8th ed. 727; S. C., 3 Doug. 345. But where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the ground on which it proceeded. *Bernardi v. Motteux*, 2 Doug. 574; *Lothian v. Henderson*, 3 B. & P. 499. And if the condemnation does not plainly proceed upon the ground of enemies' property, or of non-compliance with subsisting treaties, but on the ground of regulations arbitrarily imposed by the captor, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation will not be admitted as conclusive of a breach of neutrality. *Pollard v. Bell*, 8 T. R. 444, and cases collected in Park Ins. 8th ed., 730, *et seq.* In order to conclude the parties from contesting the ground of condemnation, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just one by the laws of nations, or upon another ground which would amount only to a breach of the municipal regulations of the condemning country. *Per Tindall, C. J., Dalgleish v. Hodgson*, 7 Bing. 504; *Hobbs v. Henning*, 18 C. B., N. S. 791; 34 L. J., C. P. 117.

Proceedings *in rem* in the Admiralty Court, in a collision cause, followed by an order for the sale of the ship and payment of the amount to the plaintiffs are no bar to an action of damages against the owners personally, if the proceeds of the sale are less than the damage sustained by the collision. *Nelson v. Couch*, 15 C. B., N. S. 99; 33 L. J., C. P. 46; and see *The Sylph*, L. R., 2 Adm. 24.

Effect of Judgments of Inferior Courts.

It would seem, upon principle, that the final judgment of a competent inferior court, whether of record or not, acting within its jurisdiction, will be conclusive between the same parties upon the same subject-matter where properly relied on. *Moses v. Macferlan*, 2 Burr. 1009; *Galbraith v. Neville*, 1 Doug. 6, n.; *Routledge v. Hislop*, 2 E. & E. 549; 29 L. J., M. C. 90; *Flitters v. Alfrey*, *infra*. And see the observations in 1 Stark. Ev., 2nd ed., 228. So it has been held that a certificate from commissioners under an Act for settling the debts of the Army, stating the sum due from the defendant to the plaintiff, is conclusive in an action brought to recover the money. *Moody v. Thurston*, 1 Stra. 481; see *Att.-Gen. v. Davison*, M'C. & Y. 160. The judgment in a County Court action is conclusive as to any facts decided thereby; the judgment will appear by the record, but from the form of proceedings it is necessary to explain by parol what points were raised in the County Court and decided by the judgment. *Flitters v. Alfrey*, L. R. 10 C. P. 29.

A County Court order under 19 & 20 Vict. c. 108, ss. 50, 51, for giving up possession of premises made against a person holding under the tenant and complied with by him, is not conclusive evidence of title in a subsequent action against such person for mesne profits. *Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50. And such order would seem not to be conclusive against him even as to the right to possession; *Hodson v. Walker*, L. R. 7 Ex. 55; in which case it was held (*diss. Martin, B.*), that

the order did not affect the rights of a person not a party to the proceedings.

In order to be a bar, the proceedings in a court of limited jurisdiction must show on the face of them, expressly or by necessary intendment, that the court had jurisdiction in the matter. *Taylor v. Clemson*, 2 Q. B. 978, 1031; 11 Cl. & Fin. 610; *Cox v. London, Mayor of*, L. R. 2 H. L. 239. So also the judgment of an inferior court of local jurisdiction may be avoided by proof that the cause of action did not arise within its jurisdiction; *Herbert v. Cook*, 3 Doug. 101; S. C. Willea, 36 n.; *Briscoe v. Stephens*, 2 Bing. 213; or that defendant, the debtor against whom the inferior court awarded process, did not reside within the district; *Carratt v. Morley*, 1 Q. B. 18; it not appearing that any proof of residence had been, in fact, given to the court below. See also *Huzham v. Smith*, 2 Camp. 19. The above cases related to district courts having no statutable or other power, except over causes arising within the territorial limits. Where the court is limited only as to certain *persons* or *causes*, and not as to *locality*; or where the jurisdiction of the court, though established for a limited district, can lawfully exercise powers out of it; or where the practice of the inferior court requires, and is warranted by law in requiring, that the defect of jurisdiction should be pointed out by plea or otherwise, and the defendant has waived the objection;—in such cases it would seem that the inquiry will be, not simply where the cause of action arose, or where the parties reside, but whether the court had jurisdiction. As to the jurisdiction of the Mayor's Court, London, see *Cox v. London, Mayor of*, *supra*: *L. Joint Stock Bank v. Id.*, 1 C. P. D. 1; 5 C. P. D. 494, C. A.; 6 Ap. Ca. 393, D. P.; and *Cooke v. Gill*, L. R., 8 C. P. 107.

It has been that a judgment of the old County Court is examinable, and the existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the County Court to set aside the proceedings for irregularity had been dismissed. *Thompson v. Blackhurst*, 1 N. & M. 266. But in such case there must be a proper defence to let in the inquiry. *Williams v. Jones*, 13 M. & W. 628. Where trespass was brought for executing a warrant to levy a poor-rate, the plaintiff was not permitted to impugn the appointment of the overseers on the ground of irregularity or miscalculation of votes at the meeting of justices at which the appointment was made; the jury having expressly negatived fraud. *Penney v. Slade*, 5 N. C. 319.

Where a cause was removed by *habeas* from an inferior court after a judgment by default, that judgment was not evidence against the defendant in the superior court. *Bottings v. Firby*, 9 B. & C. 762.

Effect of Convictions.

It is a general rule that the judgments of all courts of competent jurisdiction are conclusive for the purpose of protecting their judicial officers acting within the scope of their authority. Thus, where the justices of the peace have an authority given to them by Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done. *Per Abbott, C. J.*, *Basten v. Carew*, 3 B. & C. 653. Therefore where, in trespass against two magistrates for giving the plaintiff's landlord possession of a farm as deserted, the defendants produced in evidence a record of their

proceedings under the statute 11 Geo. 2, c. 19, s. 16, which set forth all the circumstances necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, it was held that this record was not traversable, and was a conclusive answer to the action. *Ibid.* So, in trespass against magistrates for taking and detaining a vessel, a conviction by them under the Bum-boat Act (2 Geo. 3, c. 28), was conclusive evidence that the vessel in question was a "boat" within the meaning of the Act. *Brittain v. Kinnaird*, 1 B. & B. 432. See further *Kemp v. Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158, and cases cited, *post*, Part III., *sub tit.*, *Actions against justices*.

The recital of an information on oath in a warrant of commitment in the nature of a conviction (as for refusal to give sureties of the peace) is evidence for the justice of such information. *Haylock v. Sparke*, 1 E. & B. 471. Though it was held otherwise in the case of a warrant to apprehend on a charge. *Stevens v. Clark*, 2 M. & Rob. 435. See *R. v. Richards*, 5 Q. B. 926. In like manner a conviction for a contempt by commissioners of a court of requests is conclusive for them in an action of trespass against them; and the plaintiff cannot controvert the fact of contempt, though unnecessarily alleged in the plea. *Aldridge v. Haines*, 2 B. & Ad. 395. But a want of jurisdiction in the commissioners may be shown. *Andrews v. Marries*, 1 Q. B. 3.

An affiliation order obtained by E. W. may be used to contradict E. W., who, when called to prove her marriage and the legitimacy of the plaintiff her son, denied, on cross-examination, that she had ever applied to the magistrates for an affiliation order. *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267.

Notwithstanding some authorities to the contrary (B. N. P. 245; Gilb. Ev. 30), it is now settled that a record of a conviction is inadmissible as evidence of the same fact coming into controversy in a civil suit. *Gibson v. M'Carty*, Cas. temp. Hardw. 311; *March v. March*, 28 L. J., P. & M. 30; *Castrique v. Imrie*, L. R., 4 H. L. 434, per Blackburn, J. In many of the earlier cases the conviction was held inadmissible by reason of the evidence on which it was procured. See *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 139; *Brook v. Carpenter*, 3 Bing. 297; *Smith v. Rummens*, 1 Camp. 9, 151. But the conviction was also inadmissible, on the ground that it was *res inter alios acta*, and this objection is still in force. See *Gibson v. M'Carty*, *supra*; and *Peake* Ev. 41, *et seq.* Yet, a plea of guilty on an indictment for assault is evidence by way of admission against the defendant in an action for that assault. *Trial, per Pais*, 1 Phill. Ev., 7th ed., 328; *R. v. Fontaine Moreau*, 11 Q. B. 1033. Though a verdict of guilty would not be evidence. *R. v. Warden of the Fleet*, 12 Mod. 337—9. But a conviction may sometimes be admissible as evidence of reputation. See *Petrie v. Nuttall*, 11 Exch. 569; 25 L. J., Ex. 200. When a conviction operated *in rem* it was evidence *inter alios*, though obtained by the testimony of the party who used it in evidence. *Davis v. Nest*, 6 C. & P. 167.

Effect of Sentences of Visitors, &c.

The sentence of expulsion of a member of a college by the master and fellows is conclusive, and cannot be impeached in a court of law. *R. v. Graddon*, Cowp. 315. A sentence of deprivation by a visitor of a college is in the same manner conclusive, and the grounds of it not examinable in any court. *Philips v. Bury*, 1 Ld. Raym. 5; S. C., 2 T. R. 346; see *Hargr. Law Tracts*, 464, 465. So, in ejectment against a schoolmaster, who has

been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it is not necessary for the plaintiffs to prove the grounds of the sentence, and the defendant cannot disprove them. *Doe d. Davy v. Haddon*, 3 Doug. 310.

Effect of Judgments of Foreign Courts.

The judgment of a foreign court (and for this purpose Irish, Scotch, and Colonial courts are foreign courts) of competent jurisdiction, directly deciding a question cognisable by the law of the country, is conclusive here, if the same question arise incidentally between the same parties, and the sentence be conclusive by the law of the foreign country. *Garcias v. Ricardo*, 12 Cl. & Fin. 368; *Burrows v. Jemino*, 2 Stra. 733; *Stafford v. Clark*, 2 Bing. 377; *Crispin v. Doglioni*, 3 Sw. & Tr. 96; 32 L. J., P. M. & A. 169; *Dent v. Smith*, L. R., 4 Q. B. 414; *Messina v. Petrocchino*, L. R., 4 P. C. 144; see cases collected in notes to *Kingston's (Ds. of) case*, 2 Smith's L. C. 8th ed. 829, *et seq.* Thus, in an action on a covenant to indemnify the plaintiff from all debts due from the late partnership of the plaintiff, defendant, and another, and from all suits, &c., proof of the proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which suit a decree passed against them for want of answer, *per quod* the plaintiff was obliged to pay the debt, is conclusive against the defendant, who will not be permitted to show that the proceedings were erroneous. *Tarleton v. Tarleton*, 4 M. & S. 20.

In an action brought in this country upon the judgment of a foreign court having jurisdiction over the parties and subject-matter of the suit, such judgment must now be taken as conclusive and binding on both parties, so as to preclude their contesting the merits or propriety of the decision, although formerly on this question much difference of opinion prevailed. *Ferguson v. Mahon*, 11 Ad. & E. 179; *Australasia, Bank of, v. Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J., Ex. 238; *Munroe v. Pilkington*, 2 B. & S. 11; 31 L. J., Q. B. 81; *Vanquelin v. Bonard*, 15 C. B., N. S. 341; 33 L. J., C. P. 78; *Ellis v. M'Henry*, L. R., 6 C. P. 228; *Godard v. Gray*, L. R., 6 Q. B. 139.

But if it appears on the face of the foreign proceedings or by extrinsic proof that the judgment is against natural justice, as that the defendant has never been summoned (in which case the court could have no jurisdiction), the courts here will not give effect to it. *Ferguson v. Mahon*, *supra*; *Buchanan v. Rucker*, 9 East, 192; S. C., 1 Camp. 63; *Cavan v. Stewart*, 1 Stark. 525. So, where the judgment has been obtained by fraud. *Ochsenbein v. Papelier*, L. R., 8 Ch. 695; even although the foreign court tried the question of fraud and decided that it had not been committed. *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, C. A. So, where the judges in the foreign court were interested parties. *Price v. Dewhurst*, 8 Sim. 279. But it is no objection that the proceedings have (according to the law of the foreign country) been served upon a public officer in the absence of the defendant. *Becquet v. MacCarthy*, 2 B. & Ad. 951; and see *Cowan v. Braidwood*, 1 M. & Gr. 882; *Australasia, Bank of, v. Harding*, *post*, p. 197; see also *Valle v. Dumergue*, 4 Exch. 290; *Copin v. Strachan*, and *Copin v. Adamson*, L. R., 9 Ex. 345; 1 Ex. D. 17, C. A.

In order to render the judgment binding in this country, it must appear that it was final and conclusive in the foreign court in which it was given; *Plummer v. Woodburn*, 4 B. & C. 625, 637; *Frayes v. Worms*, 10 C. B., N. S. 149; that the cause of action was exactly the same; *Callandar v. Dittrich*,

4 M. & Gr. 68; and that the parties were within or subject to its jurisdiction; *Obicini v. Bligh*, 8 Bing. 335; *Novelli v. Rossi*, 2 B. & Ad. 757, explained in *Castrique v. Imrie*, L. R., 4 H. L. 435, *per* Blackburn, J. As to when a court has jurisdiction, see *Schibby v. Westenholz*, L. R., 6 Q. B. 155. The judgment to be conclusive must be on the merits; *The Delta*, 1 P. D. 393. Thus, a foreign judgment in favour of the defendant on the foreign Statute of Limitations is no bar to an action here, where the statute only bars the remedy and not the right; *Harris v. Quine*, L. R., 4 Q. B. 653. In these respects an Irish, Scotch, or Colonial judgment stands on the same footing as a foreign judgment. *Harris v. Saunders*, 4 B. & C. 411; *Ferguson v. Mahon*, and other cases cited *ante*, p. 196. Mistake by the foreign court as to the English law applicable to the case affords no defence to an action on the judgment, it being a question of fact in that court. *Godard v. Gray*, L. R., 6 Q. B. 139. But where the foreign court acts in defiance of the comity of nations by refusing to recognise a title properly acquired according to the laws of England, our courts will not give effect to its decision. *Simpson v. Fogo*, 1 J. & H. 18; 29 L. J., Ch. 657; S. C., 1 H. & M. 195; 32 L. J., Ch. 349. This case was recognised as good law in *Castrique v. Imrie*, L. R., 4 H. L. 436, *per* Blackburn, J.

Where there was a decree in Ireland against the validity of a will of lands in England and Ireland, such decree was held no bar to a suit between the same parties in the English Chancery respecting the land in England devised by the same will. *Boyse v. Colclough*, 1 K. & J. 124; 24 L. J., Ch. 7. In *Australasia, Bank of, v. Harding*, 9 C. B. 661; 19 L. J., C. P. 345, it was held on demurrer to a plea of judgment recovered in a British colony against the defendant, pleaded to a count on a simple contract, that such a judgment was no merger in this country, though it might be so in the colony; and, generally, that a foreign judgment was only *prima facie* evidence of a debt here. The mere pendency of a suit in a foreign court is no bar to a suit in this country for the same cause. *Ostell v. Lepage*, 5 De. G. & Sm. 95; 21 L. J., Ch. 501. A judgment against the defendant in the Consular Court in Constantinople, and payment to the plaintiff under the judgment, is a conclusive bar to another action in this country by the plaintiff against the defendant for the same cause of action. *Barber v. Lamb*, 8 C. B., N. S. 95; 29 L. J., C. P. 234.

A notarial attestation, purporting to contain the substance, but not the tenor, of a judgment of the Court of the Inquisition at Rome, stating the offences for which the defendant had been sentenced, and sealed with the seal of that court, is inadmissible as evidence of the offences alleged therein to have been committed. *R. v. Newman*, Dearsly, C. C. 85. The document was there admitted as proof that a judgment had been pronounced, but not of the grounds of it; and it seems questionable how far it was admissible even for this purpose; for it was a mere certificate of what the notary considered to be the result of a selected portion only of the original proceedings.

Effect of Court Rolls and Manor Books.

Court Rolls, whether of a court baron or customary court, are evidence as well between the lord of the manor and his tenants or copyholders (B. N. P. 247), as against them; *Att.-Gen. v. Hotham*, 1 Turn. 217; and for many purposes, as against strangers. Copies of court rolls purporting to be a surrender by a person shown to have been in possession of the land, and an admittance of the surrenderee accordingly, are evidence against the defendant

both of the copyhold tenure and of the title of surrenderee, in an action by him for use and occupation. *Standen v. Christmas*, 10 Q. B. 135.

They will be admitted as evidence of reputation within the manor; and even an ancient custumal, not properly a court roll, nor signed by any of the tenants, but found among the rolls and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, has been admitted as evidence to prove the course of descent within a manor. *Denn d. Goodwin v. Spray*, 1 T. R. 466. So, a presentment by the homage on the court rolls of a manor stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe d. Beebee v. Parker*, 5 T. R. 26. Entries of admissions *durante castâ viduitate* are evidence of a custom to hold on that condition, though there may be no instance of a forfeiture for incontinence. *Doe d. Askew v. Askew*, 10 East, 520. Proof of the admission of the youngest among the collaterals of a certain degree of consanguinity is not evidence *per se* of the custom of descent to the youngest of a more remote degree; thus the entry of an admission of the youngest son of an uncle is no evidence that the custom extends to youngest son of the youngest brother of a great-grandfather. *Muggleton v. Barnett*, 2 H. & N. 653; 26 L. J., Ex. 47; 27 L. J., Ex. 125; Ex. Ch. An entry of an admission reciting a previous surrender to the use of a will, is evidence of the surrender (the latter being lost) in proof of a settlement by estate. *R. v. Thrushcross*, 1 Ad. & E. 126. In an action by a copyholder against a freeholder of a manor, an ancient parchment writing, preserved among the muniments of a manor, purporting to be signed by certain copyholders of the manor, was held to be evidence, as against the plaintiff, of the reputation of the manor as to a customary right of common set up to him. *Chapman v. Cowlan*, 13 East, 10. The court rolls are evidence of proclamations before seizure of a forfeited copyhold, though tendered on behalf of a party claiming under the lord after seizure. *Doe d. Tarrant v. Hellier*, 3 T. R. 164. A presentment of a jury at a manor court, setting forth the bounds of the manor, is admissible evidence of the bounds, though mutilated in part, such part not being apparently connected with the subject of boundary. *Evans v. Rees*, 10 Ad. & E. 151. The existence of a customary compiled within the period of legal memory is conclusive evidence against the existence of a custom not mentioned therein. *Portland, Dk. of, v. Hill*, L. R., 2 Eq. 765. See also *Anglesey, Ms. of, v. Hatherton, Ld.*, 10 M. & W. 218.

Entries of amercements on court rolls for acts of waste, offered in proof of the nature of a customary tenure, were said not to be admissible for that purpose without proof of payment. *Rowe v. Brenton*, 3 M. & Ry. 302. Yet it is not common to find in ancient court rolls anything to indicate such payments. Whether made voluntarily or upon process, the entry of payment is more likely to appear in the bailiff's accounts, or in the estreat rolls.

Presentments by the leet jury of unlawful fishing in a stream belonging to the lord of the manor are not evidence for the lord of his right to the stream; for they are made in the exercise of a criminal jurisdiction, and are *res inter alios*; *per Erle, J.*, in *Mildmay v. Newton*, Winton Sum. Ass. 1846; *dubitante Coleridge, J.*, in *Waddington v. Newton*, Winton Sum. Ass. 1850, who was disposed to admit them, on the same presentments being tendered at a subsequent trial on the same question between other parties. See *ante*, p. 195. In *Calmady v. Rowe*, see 6 C. B. 877, 878, presentments of purprestures were rejected by Patteson, J., because no fine appeared to have been imposed; and it should seem that a bare presentment, without more, is only evidence where reputation within the manor is admissible.

Entries of fines assessed in the books of a deceased steward are not evidence of a custom to take such fines unless there be some proof of payment. *Ely, Deane, of, v. Caldecott*, 7 Bing. 433. Presentments are not evidence of matters not within the jurisdiction of the homage; as a presentment by the freeholders of a right of common enjoyed by the owner of a certain farm. *Richards v. Bassett*, 10 B. & C. 657.

Effect of Public Books and Public Documents.

Public books and documents of an official character are in many instances evidence, even as between strangers, of the facts therein recorded. Thus where a duty is cast by common law or statute upon a person to register or certify that certain facts existed *within his knowledge*, the register or certificate would, it seems, be evidence of those facts; and in some cases the statute requiring the registration to be made provides that the register shall be evidence altho' the facts are not within his knowledge, e.g. registers of births and deaths, *ante*, pp. 119, 120. In all other cases, however, the register would be admissible in proof of the *fact* of registration only. Thus a report made by public officers is admissible only in proof that they have made a report, but not of the facts therein stated. *Sturla v. Freccia*, 5 Ap. Ca. 623, D. P. The term "public document" is used in the sense of one made by a public officer, for the purpose of the public using it and being able to refer to it: the public having access thereto are not necessarily all the world, but may be limited, e.g. the tenants of a manor, or the members of a corporation, *Id.* 643, *per* Ld. Blackburn.

The official indorsement or certificate, or entry in the officer's book, of the registration of a deed required by statute to be registered is *prima facie* evidence of its registration. *Grindell v. Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333, and see *ante*, pp. 134, 135; and also, where the statute requires the observance of certain formalities at the time of such registration, that those formalities have been complied with; S. C. See further, *ante*, p. 41. The registration does not, however, afford evidence that other requisites necessary to the validity of the deed registered have been complied with; as that a composition deed has been assented to by the requisite majority of creditors. *Bramble v. Moss*, L. R., 3 C. P. 458. And particular facts supplied by private persons do not become evidence against third persons, merely because they are entered in a public register. *Huntley v. Donovan*, 15 Q. B. 96, *post*, p. 201. *Accord. Re Wintle*, L. R., 9 Eq. 373, *ante*, p. 120. See also, as to the effect of the entry of a memorial of a conveyance on a county register, *ante*, p. 135. The stats. 8 & 9 Vict. c. 113, s. 1 (*ante*, pp. 94, 95), and 14 & 15 Vict. c. 99, s. 14 (*ante*, p. 96), will assist in the proof of public documents.

The following are some of the cases in which evidence of this kind has been received. Lists of registers which have been treated as authentic will be found in most of the books on evidence, but sufficient care has not been taken to distinguish between proof of a document, and its effect when proved.

The register of the Navy Office, with proof of the usage to return all persons dead with the mark *Dd.*, has been admitted to prove the death of a sailor. B. N. P. 249. So, the books of the Sick and Hurt Office, made up from returns of the King's ships, and kept by a public officer under the Admiralty, are evidence of the death of a sailor. *Wallace v. Cook*, 5 Esp. 117. As to similar registers in the Army, see 42 & 43 Vict. c. 8, s. 3.

Books in the First Fruits Office are evidence of collations. *Irish Society v. Derry, Bp. of*, 12 Cl. & Fin. 641. The book at Lloyd's, stating the capture of a ship, was held evidence of such capture in an action on a policy, and also of notice of the loss, as against a subscriber to Lloyd's in the habit of examining the books there. *Abel v. Potts*, 3 Esp. 242. It is also evidence against an underwriter of the time of sailing; for he is presumed to have knowledge of its contents. *Macintosh v. Marshall*, 11 M. & W. 116. But a certificate by an agent of Lloyd's is not evidence of the amount of damage even against a subscriber. *Drake v. Maryatt*, 1 B. & C. 473. The log-book of a man-of-war is evidence to prove the time of a vessel sailing under its convoy, in an action on a policy upon such vessel. *D'Israeli v. Jowett*, 1 Esp. 427. Such log-book, however, is only evidence when produced as an official public book from the Admiralty; *Rundle v. Beaumont*, 4 Bing. 537; otherwise it can only be used to refresh the memory of the person who made the entries; *Burrough v. Martin*, 2 Camp. 112. As to merchant-logs, see the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 285, cited *ante*, p. 122. An official letter written at the end of a voyage by the captain of a convoy, and produced by the Admiralty, seems to have been held evidence of the facts stated in it in a suit *inter alios*. *Watson v. King*, 4 Camp. 276. Muster rolls of the King's ships, produced from the Admiralty, are evidence of the fact that persons therein named were then on board. *Semb. Barber v. Holmes*, 3 Esp. 190, and the cases cited and recognised *arguendo*, 15 Q. B. 100. A copy of the searcher's report at the Custom House is evidence of the cargo on board, being an official paper made under the statute. *Johnson v. Ward*, 6 Esp. 48. In the Court of Admiralty, entries in the journals of the lighthouses, *The Maria das Dores*, Brown & L. 27; 32 L. J., P. M. & A. 163; and of coastguard stations, *The Catherina Maria*, L. R., 1 Ad. & Ec. 53; were admitted in evidence to show the state of wind and weather at a given time without further proof, although not admissible at common law. *Per Lushington, J.*, Brown. & L. 28; 32 L. J., P. M. & A. 164.

The bank books are the best evidence to prove a transfer of stock; the testimony of the broker is not enough. *Breton v. Cope*, Peake, 30. The book from the master's office will prove a person to be a solicitor of a superior court, without production of the roll. *R. v. Crossley*, 2 Esp. 526. The poll-books at an election are evidence. *Mead v. Robinson*, Willes, 424. So, the polling-papers, handed in at a municipal election and produced by the town clerk, were, it seems, evidence of the vote given; but the custody of them must be traced, so as to identify them as original papers; and the mere production of papers, purporting to be such, by a succeeding town clerk is not enough. *R. v. Ledgard*, 8 Ad. & E. 535. So, the books of the old King's Bench and Fleet prisons were admitted to prove the dates of the commitment and discharge of prisoners; *R. v. Aickles*, 1 Leach, C. C. 239; although not then kept by any public authority; but they are not evidence of the *cause* of commitment, of which the commitment itself is the best evidence. *Salte v. Thomas*, 3 B. & P. 188.

The copy of an official paper containing the number of passengers on board a vessel, made by the master in pursuance of an Act of Parliament, and deposited at the India House, is admissible to show the number and description of the persons on board the vessel. *Richardson v. Mellish*, Ry. & M. 66; S. C. 2 Bing. 229. Excise books, transcribed from the maltster's specimen paper, are evidence against him, without calling the officers who have transcribed them. *R. v. Grimwood*, 1 Price, 369. Shipping entries at the Custom House have been disallowed as evidence to fix a party with fraud, unless the original note, from which the entry was made, be produced

and traced to him or his agent. *Hughes v. Wilson*, 1 Stark. 179. So, formerly, an entry of the sale of a ship in the register of the Custom House was thought not to be evidence of ownership without connecting the party with it, though made under an Act of Parliament. *Fraser v. Hopkins*, 2 Taunt. 5; but now see *Effect of ship's register, post*, p. 206. So, the certificates or reports which are required to be made by masters of foreign vessels at the Custom House for the purpose of landing, and filed there, are not evidence of the particulars certified (except as against the master and those in privity with him). *Huntley v. Donovan*, 15 Q. B. 96. The books of the clerk of the market, made up under stat. 47 Geo. 3, sess. 2, c. 68, s. 29, were not, *per se*, evidence of the contract of sale as between the buyer and seller of coals in London, though the act made such entries evidence "in all actions touching anything done in pursuance of it." *Brown v. Capel*, M. & M. 374.

Entries in the books of the clerk of the peace of deputations granted many years since to gamekeepers by the owner of a manor are evidence, without production of the deputations themselves, to show that the party therein mentioned exercised the right of appointing gamekeepers. *Hunt v. Andrews*, 3 B. & A. 341; and see *Rushworth v. Craven*, M'Cl. & Y. 417. A book of claims, kept by the clerk (deceased) of an inclosure commission, signed by the commissioners, is evidence of such claims, the originals being lost. *Doe d. Welsh v. Langfield*, 16 M. & W. 497. A manuscript book of the date of Eliz., purporting to be written by an officer of the Duchy of Lancaster, and describing the duties of the office, is not evidence in behalf of his successor claiming to exercise the same rights and duties under an appointment from the duchy. *Jewison v. Dyson*, 2 M. & Rob. 377. Where the plaintiff, the surgeon of a workhouse, was desirous of disproving neglect of a pauper, he was not permitted to put in evidence a journal kept by him and stating his attendances, though it was kept by order of the Poor Law Commissioners under 4 & 5 Will. 4, c. 76. *Merrick v. Wakley*, 8 Ad. & E. 170. Returns of sales of corn under 1 & 2 Geo. 4, c. 87, were not conclusive, if evidence at all, to show the parties to whom the corn was delivered; for it was no part of the duty of the corn factor to mention this in the return. *Woodley v. Brown*, 2 Bing. 527. An entry in a vestry-book, stating that A. was duly elected treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of such election, and of its regularity. *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. & P. 441. But it must appear by the entry, or *aliunde*, that the meeting was duly convened after proper notice. *Heysham v. Forster*, 5 M. & Ry. 277. So, a wardmote-book proves the election of a constable in the City of London. *Underhill v. Witts*, 3 Esp. 56. In an action for disturbing the plaintiff in the enjoyment of a pew claimed in right of his messuage, an old entry in the vestry-book signed by the churchwardens, stating repairs of the pew by a former owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is evidence to prove the plaintiff's title; for it is made by the churchwardens on a subject within the scope of their official authority. *Price v. Littlewood*, 3 Camp. 288. But see *Cooke v. Banks*, 2 C. & P. 478. The book kept by the secretary of bankrupts was held not even secondary evidence of a certificate. *Henry v. Leigh*, 3 Camp. 499. But now see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 133, cited *post*, Part III., *Actions by trustees of bankrupts*.

Books, &c., of public companies.] The transfer book of a railway company is not evidence of the title of the transferee, though an Act of Parliament makes the entry necessary to complete the title. *Hare v. Waring*, 3 M.

& W. 362. Where a water company was sued on a bond, their books were rejected, as proof for them that the bond was executed at an irregular meeting, although the plaintiff was a proprietor, and the private act required such books to be kept, and to be open for inspection to proprietors. *Hill v. Manchester, &c., Waterworks Co.*, 5 B. & Ad. 866. In the Act in the last case there was no provision to make the books evidence, and the plaintiff, though a proprietor, was considered as a stranger *quoad hoc*, the books being those of the corporate body, and not of the proprietors generally. But in the recent Acts regulating the incorporation of companies, provision is made for the entry of proceedings, &c., in books, and those books are receivable in evidence; *vide post*, Part III., *Actions by and against companies*. As to the effect of the issue of share certificates by a company and the registration of shares, *vide Id.*

Bankers' account books.] As to effect in evidence of bankers' account books under the Bankers' Books Evidence Act, 1876 (39 & 40 Vict. c. 48), *vide ante*, p. 116.

Land-tax books.] Land-tax assessment books are evidence of the occupation of land by the parties named in them. *Doe d. Strode v. Seaton*, 2 Ad. & E. 171. But, where it was proved to be usual to make no alteration in the name as long as the land was in the same family, they were rejected. *Doe d. Stansbury v. Arkwright*, *Ib.* 182, n. The proof of redeemed land-tax is the certificate of the commissioner, or copy of the register. *Buchanan v. Poppleton*, 4 C. B., N. S. 20; 27 L. J. C. P. 210.

Heralds' books.] The heralds' visitation-books, made under commissions regularly issued till the close of the seventeenth century (2 Jac. 2), are evidence of the facts therein recorded in matters of pedigree. B. N. P. 248; Report on Public Records, 1800, p. 82. It is usual, and safer, to be prepared with evidence of the commissions; though, as they were general ones, and not merely issued *pro hac vice*, such evidence is, perhaps, not strictly necessary. See *Proof of Inquisitions, &c.*, *ante*, p. 105. It is doubtful, however, whether these visitation-books are admissible in evidence, *inter alios*, of the facts therein recorded. See *Polini v. Gray*, 12 Ch. D. 428, 433, 435, *per* C. A. A certificate taken from the register of the funerals of Peers at the Herald's College is admissible in evidence as an official document taken by persons whose duty it was to make it up. *Vaux Peerage*, 5 Cl. & F. 526. But a pedigree, deduced from these books and drawn up by a herald, is not admissible. *King v. Foster*, T. Jones, 224; 2 Rol. Ab. 686. So, a written pedigree, *purporting* to be made by one of the family, and entered in the heralds' books, is not evidence. *Per Fortescue, J.*, 12 Vin. Abr. Evid. p. 119. An affidavit stating the members of deponent's family, found in the heralds' office, may be good evidence as a declaration; and where the original was lost, an entry of it in their books has been allowed as secondary evidence. *Per Littledale, J.*, *Doe d. Hungate v. Gascoigne*, 2 Stark, Ev. 2nd ed., App. 1087.

Bishops' registers.] The official register-book of a bishop, containing entries of the transactions at visitations, has been admitted as evidence of the right of nomination to a curacy. *Arnold v. Bath and Wells, Bp. of*, 5 Bing. 316. So, episcopal registers have been admitted as evidence of vicarial endowments; *Tucker v. Wilkins*, 4 Sim. 262; *Leonard v. Franklyn*, 1 Daniel, 34; or of collations; *Irish Society v. Derry, Bp. of*, 12 Cl. & Fin. 641; or of the foundation of a deanery in the 13th century; *R. v. S. Peter's*

Exeter, 12 Ad. & E. 512. An enrolment-book of leases, granted by the Bishop of Durham, was allowed as secondary evidence of a lease on behalf of one claiming under the bishop; being a public muniment; *Humble v. Hunt*, Holt, N. P. 601; and a similar register of chapter leases, from the Chapter House of Salisbury, was admitted as evidence of reputation respecting the limits of a parish; *Per Tindal*, C. J., in *Coombs v. Coether*, M. & M. 398. It seems to be on this footing that the foundation charters and grants, registered and preserved among the muniments of dissolved monasteries, are admitted in evidence on behalf of the successors to their estates; at least where the originals cannot be found; *ante*, pp. 14, 15, 97, *et seq.* See also *ante*, pp. 134, 135, as to *Enrolled deeds*.

Notarial and consular certificates.] A notarial certificate of the protest abroad of a foreign bill of exchange is evidence of that fact. *Bayley* on Bills, 490; *Anon.*, 12 Mod. 345; and see further *Geralopulo v. Wieler*, 10 C. B. 690; 20 L. J., C. P. 105, cited, *post*, *Action on bills of exchange.—Protest*. So, a certificate, which purported to be given by a notary public, verifying the signature of a person abroad before whom an affidavit is sworn, and stating that that person is competent to administer oaths, is evidence of these facts. *Ex pte. Worsley*, 2 H. Bl. 275; *Omealey v. Newell*, 8 East, 364; *Cole v. Sherard*, 11 Exch. 452. See *Abbott v. Abbott*, 29 L. J., P. M. & A. 57; *ante*, p. 121. As to the admissibility of an affidavit sworn before a notary abroad, see *In re Bernard*, 2 Sw. & Tr. 489; 31 L. J., P. M. & A. 89; *In re Lambert*, L. R., 1 P. & M. 138, *contra*; and *In re Davis' Trusts*, L. R. 8 Eq. 98. By 15 & 16 Vict. c. 86, s. 22, the Court of Chancery was to take judicial notice of the seal or signature of a notary public in Scotland or Ireland, or a British colony, affixed or subscribed to certain documents to be used in the said court. This enactment extends to the High Court. *Brooke v. Brooke*, 17 Ch. D. 833. See also Rules, 1883, O. xxxviii., r. 6, *ante*, pp. 77, 78.

But, in other cases, notarial and consular certificates are not evidence of the facts certified; thus the presentment in England of a foreign bill cannot be so proved. *Chesmer v. Noyes*, 4 Camp. 129. So a notarial certificate of the execution of a power of attorney abroad was held to be insufficient evidence. *Ex pte. Church*, 1 D. & Ry. 324. Though, under 15 & 16 Vict. c. 86, s. 22, *ante*, p. 78, it would now be otherwise in the case of a power of attorney to be used in court. *Armstrong v. Stockham*, 24 L. J. Ch. 176. In *Waldron v. Coombe*, 3 Taunt. 162, it was held, in an action on a policy of insurance on goods to recover a loss by sea damage, that the amount of the loss could not be proved by a certificate from the British vice-consul at Rio Janeiro, although it was the duty of the vice-consul to superintend the sale.

In Batavia, charter-parties are entered into by the instrument being written in a book by a notary (he being a public officer by the Dutch law, which prevails in Batavia), and there signed by the parties. The notary makes copies, which he signs and seals, and which the principal officer of the Government of Java signs, upon proof of their being executed by the notary. Then one copy is delivered to each party. In the courts of Java, in order to prove the charter-party, it is requisite to produce the notary's book; but this book is never allowed to be taken out of Java; and in Dutch courts, out of Java, faith is given to the above copies as to an original. It was held that the copies were not receivables in evidence in this country. The chief contention was that they had been made originals by the authority given to the notary by the parties themselves, which failed. The court also thought that, though secondary evidence of the contents of the notary's book might, under the circumstances, be admissible, still these copies were not sufficiently authenticated to be used for that purpose. *Brown v. Thorn-*

ton, 6 Ad. & E. 185. See *Boyle v. Wiseman*, 11 Exch. 360 ; 24 L. J., Ex. 160, *ante*, p. 5 ; and *R. v. Castro*, *ante*, pp. 92, 123.

A certificate of ordination, under the seal of the bishop, is evidence of holy orders. *R. v. Bathwick*, 2 B. & Ad. 639.

Post-mark.] The post-mark on a letter has been admitted as evidence of the date of its being sent. *Abbey v. Lill*, 5 Bing. 299 ; *R. v. Plumer*, R. & Ry. 264 ; *Kent v. Lowen*, 1 Camp. 177. But, a post-mark may be contradicted by oral evidence of the real date of posting. *Stocken v. Collin*, 7 M. & W. 515. The post-mark is no proof of a publication of the contents of the letter at the place of posting. *R. v. Watson*, 1 Camp. 215. Where it was required to prove that A. effected an insurance by order of B., the production by B. of an order in a letter, with the post-mark, addressed to A., was received as evidence that a policy effected in A.'s name of the date of the letter was effected under that order. *Arcangelo v. Thompson*, 2 Camp. 620. In *R. v. Plumer*, *supra*, it was held that the double postage office-mark on a letter was not, *per se*, proof that it contained an inclosure. See further *ante*, p. 116.

Books of history, &c.] A general history may be given in evidence to prove a matter relating to the kingdom in general. B. N. P. 248 ; Vin. Ab. Ev. (A. b. 40). Thus, chronicles are said to have been admitted to prove that at a certain period Charles V. of Spain had not surrendered the crown to Philip. *Neale v. Fry*, cited 1 Salk. 281. But see, however, S. C., *sub nom. Mossam v. Joy*, 10 How. St. Tr. 626, and Peake Ev. 82, 83, and 2 Taylor, Evidence, § 1522, n. Historical evidence of this kind is only to be used in proof of a matter concerning the government, and was therefore rejected as proof that King Alfred was the founder of a college. *Cockman v. Mather*, 1 Barnardist. 14. See *Brounker v. Atkins*, Skin. 15. Nor can it be admitted in proof of a local custom ; thus Camden's "Britannia" was held to be no evidence on an issue whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town. *Stainer v. Droitwich*, 1 Salk. 281. Nor is it evidence of the creation of a peerage. *Vaux Peerage*, 5 Cl. & F. 526. It seems indeed only to be used to refresh the memory of the jury on notorious facts, which require no evidence at all. Thus, it has been held that counsel may, in addressing a jury, refer generally to matters of history, whether ecclesiastical or political, and cite the language of writers or statesman by way of illustration or explanation ; but they are not at liberty to cite specific canons or foreign treaties, or the printed works in use among certain communities, and purporting to represent their doctrines, so as to fix a party to the suit with those doctrines, and to persuade the jury to act upon such imputation, unless such documents be proved by regular evidence, and brought home to the party by proof of his personal adoption of them. *Darby v. Ouseley*, 1 H. & N. 1 ; 25 L. J., Ex. 227.

Effect of Corporation Books.

The public official acts of a municipal corporation, registered in their books, regularly kept and entered by the proper officer, may be [and ought to be] proved by the books themselves, which are evidence of them even as between strangers. *Thetford, Case of*, 12 Vin. Ab. 90, and *R. v. Mothersell*, 1 Stra. 93. Thus, an entry of the disfranchisement of a corporator is evidence to prove it ; and it cannot be collaterally examined on the merits. *Brown v. London, Corporation of*, 11 Mod. 225. But the books of a corporation, whether public or private, are not admissible in their own favour as to matters of a private nature ; as to establish a claim of toll. *Brett v. Beales*,

M. & M. 419, cited *ante*, p. 52. *Marriage v. Lawrence*, 3 B. & A. 142; *London v. Lynn*, 1 H. Bl. 214, n.; or a right to appoint a curate as against the vicar; *Att.-Gen. v. Warwick*, 4 Russ. 222; or an exclusive right of trading. *Davies v. Morgan*, 1 C. & J. 590—3. Where plaintiff sued a corporation (of which he was an alderman) on a bond, and defendants pleaded: 1, Fraud; 2, That the bond was irregularly executed contrary to a bye-law, Parke, B., admitted the books of the corporation to prove the bye-law, but rejected them as evidence for the defendants of a private transaction between the plaintiff and the corporation in proof of the fraud. *Holds-worth v. Dartmouth, Mayor of, Exeter* Sum. Ass. 1838, MS.

Effect of Parish Registers, &c.

The registers of baptisms, marriages, and burials, preserved in churches, are good evidence of the facts which it is the duty of the officiating minister to record in them. B. N. P. 247; *Doe d. Warren v. Bray*, 8 B. & C. 816. Where it appeared that the practice was to make entries in the general parish register, once in three months, out of a day-book in which the entries were made immediately after the baptism or on the same morning; and in the day-book after a particular entry, the letters B. B. (signifying base-born) were inserted, which were omitted in the register, it was held that evidence of the day-book could not be received: for there could not be two parish registers. *May v. May*, 2 Stra. 1073. An entry by the minister of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum of the fact made by the clerk, who was present at the baptism. *Doe d. Warren v. Bray*, 8 B. & C. 813. But see *Doe d. France v. Andrews*, 15 Q. B. 756, *ante*, p. 118. As to proof of the identity of the parties, *vide ante*, p. 118.

The books of Fleet, King's Bench, May Fair, and Mint marriages are not evidence to prove a marriage, for they were not made by public authority. They were, in fact, only private memoranda kept by ministers who officiated at clandestine marriages contrary to the canons of the church. See *Burn on Fleet Registers*, ch. 6, and 3 & 4 Vict. c. 92, ss. 6, 20. Such a register, however, may, if signed by a party, be equivalent to a declaration by such party; and, as such, admissible where hearsay is admissible. *Lloyd v. Passingham*, 16 Ves. 59. A register of ceremonies performed at a dissenters' meeting-house is not admissible in evidence, for it is not a public document. *Newham v. Raithby*, 1 Phill. Rep. 315; *Ex pte. Taylor*, 1 J. & W. 483; and the stat. 6 & 7 Will. 4, c. 85, *ante*, p. 119, would appear not to have made any difference in this respect; for the register appointed by that Act is to be kept by the registrar and not at the meeting-house. Such of these registers, however, as have been deposited with the Registrar-General under 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, *ante*, pp. 118, 119, are admissible in evidence after notice. See 3 & 4 Vict. c. 92, ss. 19, *et seq.*

An attempt is sometimes made to use the register for the purpose of proving facts stated therein in addition to the main fact of baptism, marriage, or burial, as the case may be. There has been a good deal of discussion as to how far this can be done. In a criminal proceeding against a person for falsely swearing that he was 21 years of age, *Ld. Tenterden* refused to allow that part of a register of baptisms which stated the day upon which the defendant was born to be read: *R. v. Clapham*, 4 C. & P. 29; and in *W'hen v. Law*, 3 Stark. 63, and *Burghart v. Angerstein*, 6 C. & P. 690, the entry in a register of baptisms of the day of the defendant's birth was rejected as a proof of a plea of infancy. In *R. v. North Petherton*, 5 B. & C.

508, a copy of a register of baptism was put in to show that an infant was born in a certain parish, but Bayley, J., rejected the evidence; saying, however, that if it could be shown that the child was very young at the time of baptism, the register would afford presumptive evidence of its having been born in the parish where it was baptised. See *R. v. S. Katharine*, 5 B. & Ad. 970, n. Upon an issue as to the legitimacy of a child, a baptismal register which described it as the illegitimate son of E. C. was admitted by Alderson, J., though with the observation that it was entitled to little weight. *Cope v. Cope*, 1 M. & Rob. 269. A register of marriage is evidence of the time of the marriage. *Doe d. Wollaston v. Barnes*, *Id.* 386.

As to the effect of the registers of births, marriages, and deaths under 6 & 7 Will. 4, cc. 85, 86, and 37 & 38 Vict. c. 88, see *ante*, pp. 119, 120. As to the effect of registers of births, marriages, and deaths in Scotland, Ireland, the Colonies, at sea and abroad, *vide ante*, pp. 120, *et seq.*

Effect of Ship's Register.

A ship's register, describing her to be British built, was held to be no evidence of that fact as against third persons. *Reusse v. Meyers*, 3 Camp. 475. Nor was it admitted as evidence of ownership or interest, except as against the persons who made the affidavit or declaration. *Fraser v. Hopkins*, 2 Taunt. 5; *Pirie v. Anderson*, 4 Taunt. 652; *Cooper v. South*, *Id.* 803. But, since the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 107, cited *ante*, p. 122, such register is *prima facie* evidence of all the matters contained in it or certified by the registrar in his certificate, as, for instance, that the ship is British, *R. v. Bjornsen*, Leigh & Cave, 545; 34 L. J., M. C. 180; or that the defendant is owner; *Hibbs v. Ross*, L. R., 1 Q. B. 534. See also the Merchant Shipping Amendment Act, 1855, s. 15, cited *ante*, p. 123.

Effect of Awards.

An award, regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law between the parties to the reference upon all matters inquired into within the submission. 1 Phill. Ev. 360; *Campbell v. Twemlow*, 1 Price, 81. Thus, where a covenantor and a covenantee submitted the amount of damages of a breach of covenant to arbitration, the award was held conclusive of the amount in an action on the covenant to which defendants pleaded *non est factum*. *Whitehead v. Tattersall*, 1 Ad. & E. 491. See also *Cummings v. Heard*, L. R., 4 Q. B. 669. So, where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the defendant from disputing the lessor's title. *Doe d. Morris v. Rosser*, 3 East, 11. But where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord upon the tenant being paid a certain sum, it was held that the *property* in the hay did not pass to the landlord on his tender of the money by mere force of the award. *Hunter v. Rice*, 15 East, 100. Where the commissioners under an inclosure act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been advertised; it was held that, the commissioners not having pursued their

authority, their award was not binding as to the boundaries. *R. v. Washbrook*, 4 B. & C. 732 ; but see the remedial acts, *ante*, p. 143.

It has been repeatedly decided that corruption or misconduct of the arbitrators, including the case of an award made *ex parte*, does not invalidate the award, in any case, at least, in which an application might have been successfully made to the court to set it aside ; *vide post*, *Action on award, Defence*.

An award made on a reference of all matters in difference between the parties will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. *Raves v. Farmer*, 4 T. R. 146 ; *Smith v. Johnson*, 15 East, 213. And awards under inclosure acts are so far on the same footing as private submissions, that if the award goes beyond the powers of the commissioners, it is void *pro tanto* ; and if it omits to decide on anything within the scope of the submission, the interest of parties remains *in statu quo*. *Per Best, C. J.*, *Thorpe v. Cooper*, 5 Bing. 129. But, where an action by a person for his salary, and also for damages for dismissal from service, was referred, and the plaintiff gave evidence of dismissal, but claimed no damages for it before the arbitrator, who only awarded the amount of salary : held that the award was nevertheless a bar to a second action for damages for the dismissal. *Dunn v. Murray*, 9 B. & C. 780. See *Hadley v. Green*, 2 C. & J. 374. A. filed a bill against B. for the infringement of a patent, and the arbitrator found that the patent was not illegal and void : it was held that, in a subsequent action by A. against B. for infringement of the same patent, this award did not estop B. from upsetting the defence that A. was not the first and true inventor. *Newall v. Elliott*, 1 H. & C. 797 ; 32 L. J., Ex. 120.

The judgment of an usurped jurisdiction between parties is not admissible as an award without proof of mutual submission. *Rogers v. Wood*, 2 B. & Ad. 245.

An award made on ejectment, brought by A. against a mortgagor after mortgage, is not evidence for A. on an ejectment brought by the mortgagee against him. *Doe d. Smith v. Webber*, 1 Ad. & E. 119. In a suit for injury to A.'s reversionary interest in a close whereof F. was tenant, in which the defendant set up the right of G., and denied that of A., it was held that the plaintiff could not put in, as evidence of such right, an award made in a former action between F. as plaintiff and G. as defendant, in which the same right was in question, and in which G. had pleaded not guilty only, and afterwards paid damages awarded against him ; for as it was not shown that A. was substantially the plaintiff in the first action, or that F. brought it by A.'s authority, a verdict or award against F. could not have prejudiced A., and therefore could not be available as evidence for A. *Wenham, Ly., v. Mackenzie*, 5 E. & B. 447 ; 25 L. J., Q. B. 44. But where the right of a watercourse and a question of boundary were referred by a submission between A. and his tenant B. on the one side, and C., a neighbouring landowner, on the other, the award was held admissible evidence for C. on both points in a subsequent action by him against B. ; although B. had, in the mean time, become tenant of the same land to another landlord, under whom he now justified, and who was not shown to be in privity with A. *Breton v. Knight*, Winton Sum. Ass. 1837, *per Tindal, C. J.*, confirmed in Banc on motion for a new trial, MS. On an issue between plaintiff and an execution creditor of B., whether growing crops belonged to B., an award made between plaintiff and B. touching the crops, just before the execution, was held admissible as against the defendant. *Thorpe v. Eyre*, 1 Ad. & E. 926. In an action on a policy Ld. Kenyon admitted evidence that the defendant had agreed to be bound by an award to which other persons were

parties, and that the award was in favour of the plaintiff. *Kingston v. Phelps, Peake*, 228.

That an award is not evidence, as between strangers, even in a matter in which hearsay is admissible, see *Evans v. Rees*, 10 Ad. & E. 151, cited *ante*, p. 48; *Wenham, Ly., v. Mackenzie*, *ante*, p. 207. So an award against a principal debtor is not evidence in an action against his surety. *Ex pte. Young*, 17 Ch. D. 668, C. A.

The award of arbitrators or an umpire upon a claim for compensation under the Land Clauses Consolidation Act, 1845, has the same effect as the verdict of a jury in an inquisition before the sheriff under that act (*ante*, pp. 186, 187), and is conclusive as to the amount, but not as to the right to compensation. *In re Newbold & Metropolitan Ry. Co.*, 14 C. B., N. S. 405; *Beckett v. Midland Ry. Co.*, L. R., 1 C. P. 241; *R. v. Cambrian Ry. Co.*, L. R., 4 Q. B. 320. So in the case of an award under the Artizans' and Labourers' Dwellings and Improvement Act, 1875, 38 & 39 Vict. c. 36. *Wilkins v. Mayor of Birmingham*, 25 Ch. D. 78. Where the award is given for one entire sum, if any part of the sum is given contrary to law, the whole is invalidated. *Beckett v. Midland Ry. Co. supra*.

Of the effect of awards under inclosure acts, see further, *ante*, p. 143. Where an award under seal directs the payment of money, the award does not create a specialty debt, although the submission was also under seal. *Talbot v. Shrewsbury, El. of*, L. R., 16 Eq. 26.

STAMPS.

The subject of stamps, though important and useful at *Nisi Prius*, is one that cannot be treated of at length in a work of this kind. The following summary only professes to contain some of the principal heads, and a selection of the most useful decisions on the acts. Nearly all the prior Stamp Acts were repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), and their provisions embodied, with some modifications, in a consolidated form, under the title of the Stamp Act, 1870, (*Id.* c. 97.) The duties on Policies of Marine Insurance (*vide post*, p. 247), were an unfortunate exception from this consolidation.

The stamp duties cited in the following pages are all, unless otherwise stated, those specified in the schedule to the Stamp Act, 1870. These duties are, by sects. 1, 3, imposed on and after the 1st January, 1871, on the instruments specified in the schedule, in lieu of all other duties thereon, and are subject to the exemptions contained in the schedule, and in any other acts for the time being in force, and, by sect. 6, they are charged in accordance with the regulations of that act. Sect. 5 provides that "except where express provision to the contrary is made by this or any other act," the same duties are to be charged on instruments relating to the property of the Crown, or the private property of the sovereign, as on instruments relating to the property of subjects; such express provision is made in the stat. 10 Geo. 4, c. 50, s. 77, with reference to instruments entered into with H. M.'s Commissioners of Woods and Forests, under the provisions of that act; and that act is incorporated with subsequent acts, *e.g.*, 5 Vict. c. 1, s. 7.

The principal changes introduced by the act are the abolition of progressive duty and the general reduction of the 35s. stamp chargeable on deeds and other instruments to 10s. See sect. 4 (*post*, p. 239) and schedule.

In the case of certain awards and leases, *vide post*, pp. 223, 242, the duty is still 35s.

Stamp duty is chargeable on an instrument in accordance with its legal effect. *R. v. Ridgwell*, 6 B. & C. 665, 669, *per* Bayley, J.; *Hutton v. Lippert*, 8 Ap. Ca. 309, P. C.; it is immaterial by what title the parties thereto may designate the transactions therein recorded. S. C. See also *Wale v. Comms. of Int. Rev.*, 4 Ex. D. 270.

Effect of want of Stamp.—Stamp when presumed.] By the Stamp Act, 1870, s. 17, unless the duty and penalty be paid at the trial under sect. 16 (*post*, p. 216), "no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed." The words in italics are identical with those of the analogous provisions of the earliest Stamp Acts (5 & 6 W. & M. c. 21, s. 11; 9 & 10 Will. 3, c. 25, s. 59), with the exception that those were limited in their operation to evidence given in any court. Those provisions were incorporated in succeeding Stamp Acts, e.g., 55 Geo. 3, c. 184, s. 8; 13 & 14 Vict. c. 97, s. 2; &c.,—until their repeal by 33 & 34 Vict. c. 99. The cases cited below, decided under the earlier acts, are consequently applicable to the Stamp Act, 1870, s. 17, *supra*.

Sect. 22 imposes a penalty on the person who, in the course of his office, enrolls, registers, or enters, in or upon any rolls, books, or records, any instrument not duly stamped. See also sect. 57, *post*, p. 232. These sections do not, however, invalidate the registration, &c., otherwise regular, of an instrument not duly stamped. *Bellamy v. Saul*, 4 B. & S. 265; 32 L. J., Q. B. 366.

The effect of sect. 17, *supra*, is that an instrument requiring a stamp, cannot, in general, be admitted in evidence without being stamped; and consequently the objection of the want of a proper stamp is raised by any pleadings that render it necessary to put the document in evidence. Thus, in an action on a bill, the objection will arise on a traverse of the drawing or acceptance. *Darson v. Macdonald*, 2 M. & W. 26; *M'Dowall v. Lyster*, *Id.* 52. If parties agree orally or by implication to be bound by the same terms as those contained in another written instrument, the latter cannot be given in evidence unless properly stamped. *Turner v. Power*, 7 B. & C. 625; *Walliss v. Broadbent*, 4 Ad. & E. 877; *Alcock v. Delay*, 4 E. & B. 660. Where a bond, required to be given by a judge's order, had been inadvertently filed by an officer of the court, although unstamped, and immediately the defect was discovered the party filing the bond procured it to be stamped, the original defect was cured as regards third parties who had no notice of the defect; and it would seem also for all purposes. *Darby v. Waterlow*, L. R., 3 C. P. 453.

When an unstamped instrument in writing has been lost; *R. v. Castle Morton*, 3 B. & A. 588; or destroyed even by the party who objects to the want of the stamp; *Rippiner v. Wright*, 2 B. & A. 478; oral evidence of the contents is inadmissible. But where an instrument has been lost or is not produced upon notice, and there is no evidence given respecting it one way or the other, the presumption is that it was properly stamped; but if it be shown to be at one time unstamped, the presumption is that it continued unstamped, until the presumption be rebutted by some evidence *contra*, so as either to prove the stamping, or to leave it altogether uncer-

tain. *Closmadeuc v. Carrel*, 18 C. B. 36; *Marine Investment Co. v. Heaviside*, L. R., 5 H. L. 624. See also *Arbon v. Fussell*, 7 L. T., N. S. 283, Ex., M. T. 1862; *Blair v. Ormond*, 1 De G. & Sm. 428. Thus, where an indenture of apprenticeship, executed 30 years before, was lost, it was presumed to have been properly stamped, though an officer from the Stamp Office stated that it did not appear that any such indenture had been stamped. *R. v. Long Buckley*, 7 East, 45. So, an order for payment given by the defendant to the plaintiff, and lost by the latter, will be presumed, as against the defendant, to have been duly stamped. *Pooley v. Goodwin*, 4 Ad. & E. 94. An unstamped copy under the hand of the party against whom it is offered as secondary evidence is admissible, and the due stamping of the original is presumed, unless disproved. *Smith v. Maguire*, 1 F. & F. 199. Where a party refuses to produce an agreement after notice, it will be presumed, as against him, to be properly stamped; *Crisp v. Anderson*, 1 Stark. 35; unless evidence be given that it was not stamped; *Crother v. Solomons*, 6 C. B. 758. In *L. & County Banking Co. v. Ratcliffe* (see 6 Ap. Ca. 730), the C. A. received a copy, stamped as an original, as evidence of an unstamped document which had been destroyed; but it is difficult to see on what principle this copy could have been admitted. See also *Marine Investment Co. v. Heaviside*, L. R., 5 H. L. 630. If an instrument be produced at the trial bearing adhesive stamps properly cancelled, it will be presumed that they were affixed at the proper time. *Bradlaugh v. De Rin*, L. R., 3 C. P. 286.

Where the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence, if allowed by the pleadings, may be resorted to; thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration. *Farr v. Price*, 1 East, 58; *Tyte v. Jones*, *Id. n.* In *Vincent v. Cole*, M. & M. 257, where a witness called by the plaintiff stated that the work, the payment for which formed the subject of the claim, was commenced under a written agreement, but that the items relied on by the plaintiff were extras, and not contained in it, Ld. Tenterden ordered the agreement to be produced, and as it was unstamped the plaintiff was nonsuited. But, in *Reid v. Batte*, *Id.* 413, a distinct order by the defendant having been proved, Ld. Tenterden thought that, though it was shown that the work was commenced under a written contract, the contract need not be produced. And a verbal admission of a debt, and promise to pay it, may be proved, though the party at the same time gave an unstamped admission and promise to pay. *Singleton v. Barrett*, 2 C. & J. 368. So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present, and he may be allowed to use the unstamped receipt for the purpose of refreshing his memory. *Rambert v. Cohen*, 4 Esp. 213. See, as to use of unstamped copies and counterparts as secondary evidence of the originals, *post*, pp. 237, 240. In the case of the payment of legacies special evidence is required, *vide post*, p. 252. Where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such that at the trial it is not necessary to produce it, the court will not examine whether it is legally available with reference to the stamp laws. *Per* Ld. Eldon, C., *Huddleston v. Biscoe*, 11 Ves. 596; *Thynne v. Protheroe*, 2 M. & S. 553. When a bill of exchange on a wrong stamp has been given for goods sold, the vendor, in suing for the price, need not prove notice of dishonour. *Cundy v. Marriott*, 1 B. & Ad. 696.

If a plaintiff succeeds in making out a case of implied or oral contract, and it does not appear on the cross-examination of his witnesses that there

was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuiting the plaintiff. *Fielder v. Ray*, 6 Bing. 332; *R. v. Padstow*, 4 B. & Ad. 208; *Magnay v. Knight*, 1 M. & Gr. 944. But where the defendant being called as a witness for the plaintiff, proved that there was a written agreement, and on his being called on to produce it, it appeared to be unstamped, it was held that the plaintiff must be nonsuited; *Alcock v. Delay*, 4 E. & B. 660; for an unstamped agreement is not a nullity. S. C. and *R. v. Watts*, cited *Id.* A party who executes the counterpart of a deed, properly stamped, cannot object to its admissibility in evidence on the ground that the original is not properly stamped. *Paul v. Meek*, 2 Y. & J. 116. Now, however, in every case, except a lease not executed by the lessor, the counterpart must bear a denoting stamp, unless it be stamped as an original, *vide post*, p. 240. The stamp must be such as was applicable to the instrument at the time of its execution. *Clarke v. Roche*, 3 Q. B. D. 170.

Unstamped Instrument, when evidence for collateral purposes.] In many cases an instrument, not properly stamped, is admissible to prove a collateral fact. And the fact seems to be collateral, if the instrument be offered, not for the purpose of giving effect to it, but in order to prove something independent of, and unconnected with, the purpose for which the stamp is required to be impressed. Thus, in an action of debt for bribery at an election, an unstamped promissory note payable to the defendant, which a witness said he had given for the repayment of money received by him, as a voter, from the defendant, is evidence to corroborate the testimony of the witness. *Dover v. Maestaer*, 5 Esp. 92. So, an unstamped agreement has been admitted between the parties to prove usury. *Nash v. Duncomb*, 1 M. & Rob. 104. Or, to show the illegal consideration of the plaintiff's debt. *Coppock v. Bower*, 4 M. & W. 361. Or, to refresh the memory of a witness, *ante*, pp. 166, 167, 210. Or, to show fraud: thus an unstamped promissory note may be given in evidence to establish fraud, by showing that it was written by the maker in a state of intoxication. *Gregory v. Fraser*, 3 Camp. 454; *Keable v. Payne*, 8 Ad. & E. 555; *R. v. Gompertz*, 9 Q. B. 824. So, an unstamped agreement may be used to show fraud. *Ashcombe v. Ellam*, 2 F. & F. 306. And see *Holmes v. Sixsmith*, 7 Exch. 802; 21 L. J., Ex. 312. And an allegation that plaintiff delivered up a guarantee may be proved by delivery of an unstamped guarantee. *Haigh v. Brooks*, 10 Ad. & E. 309.

In *Ex parte Wensley*, 1 D. J. & S. 273; 32 L. J., Bky. 23, an unstamped and unregistered trust deed was admitted by Ld. Westbury, C., in proof of an act of bankruptcy; in *Ex parte Potter*, 34 L. J. Bky. 46, he disapproved of this case, apparently under the impression that it had been decided by Ld. Campbell; see report in 13 W. R. 190; and *Id.* n.; but *Ex parte Wensley*, *supra*, has been since followed in *Hobson v. Thelluson*, L. R., 2 Q. B. 642; in *Ponsford v. Walton*, L. R., 3 C. P. 167; and in *Ex parte Squire*, L. R., 4 Ch. 47.

It has been held that the court cannot inspect an unstamped contract even for the purpose of ascertaining whether its contents preclude the admission of oral evidence of extras. *Buxton v. Cornish*, 12 M. & W. 426. But the dictum of Bayley, J., *R. v. Pendleton*, 15 East, 449, and the decision in *Reed v. Deere*, 7 B. & C. 261, seem at variance with this ruling; however, the cases may perhaps be reconciled by holding that where the work, the price of which is claimed, cannot be proved without disclosing the existence of a written and unstamped contract, the court cannot inspect that contract for the purpose of ascertaining whether the work actually in question does or does not come within its terms; but it is otherwise where such work can

be proved by independent evidence which does not require the contract to be produced; see *infra*. Such an instrument cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. *Jardine v. Payne*, 1 B. & Ad. 670. Yet, in an action for goods sold, a bill of parcels, on which the seller has written an unstamped receipt when he made out the bill, may be put in by the defendant as evidence that another person, and not he, was debited by the plaintiff as buyer; for it is not used as a receipt, nor need that part be read. *Millen v. Dent*, 10 Q. B. 846. A statement of account is admissible against the party whose unstamped receipt for the balance is signed at the foot. *Mattheson v. Ross*, 2 H. L. C. 286. But if the payment had been in dispute in the cause, or had been material in the issue between the parties, so that it would have been necessary to instruct the jury to discharge the receipt from their minds, it is questionable whether the statement could then have been admitted, even for the collateral purpose of proving the account. *Ld. Campbell, C. J., S. C. Id.*

On trial of issues out of Chancery upon a suit for specific performance of a sale, a writing in the following form was put in by the vendee:—"Received of A. B. the sum of —, being the amount of three tenements sold by me adjoining, &c. Signed, C. D." (the vendor). The two questions were, 1. Whether there was a contract of sale? 2. Whether there was any payment? The writing was stamped as an agreement only. Upon an appeal in Chancery, *Ld. Cottenham* considered the paper inadmissible on the first issue, being an attempt to prove an agreement by proving the fact of payment. On a further trial and appeal, *Ld. St. Leonards, C.*, held it admissible evidence of the contract of sale. It was not contended to be admissible as proof of payment, and it contained all the terms of the contract, with the signature of the vendor subscribed. *Evans v. Prothero*, 2 Mac. & G. 319; 20 L. J., Ch. 448; S. C. 1 D. M. & G. 572; 21 L. J., Ch. 772.

A party declared upon two written agreements, by the second of which variations were made in the first: there were counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the first was altered by it; and that, if it was, the plaintiff could not exclude the second agreement, and proceed upon the first only. *Reed v. Deere*, 7 B. & C. 261. Where, in an action against an acceptor, it appeared that, on the bill becoming due, his name had been erased and another bill (unstamped) drawn on the back of the first, it was held that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled. *Sweeting v. Halse*, 9 B. & C. 365. But where the plaintiff proved a deposit of money on certain terms contained in a promissory note duly stamped, and the note was afterwards altered by consent so as to become invalid for want of a fresh stamp, it was held to be still admissible evidence of the terms of the deposit. *Sutton v. Toomer*, 7 B. & C. 416. On a plea of payment to an action on a bill, where some proof appeared on the plaintiff's evidence that payment was made by another bill, he may put in the bill to show that it was unavailable for want of a stamp. *Smart v. Nokes*, 6 M. & Gr. 911.

Stamps how applied.—Number required.] By the Stamp Act, 1870, s. 7, "(1.) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the

instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

(2.) If more than one instrument be written upon the same piece of material every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable."

Sect. 8. "Except where express provision to the contrary is made by this or any other act,

(1.) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters.

(2.) An instrument made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be charged with duty in respect of such last-mentioned consideration or considerations as if it were a separate instrument made for such consideration or considerations only."

The stamp required depends on the true character of the instrument, notwithstanding what it purports to be, and it is to be stamped for its leading and principal object, and this stamp covers everything accessory to this object. *Limmer Asphaltic Paving Co. v. Int. Rev. Coms.*, L. R., 7 Ex. 211, 215, 217. But where one instrument operates as two independent ones, each of which would be liable to duty, it must be stamped in respect of each. *Hadgett v. Id.*, 3 Ex. D. 46, *post*, p. 235.

Where the subject-matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus, an assignment of the prize-money of several seamen on board a privateer, payable out of one fund, requires only one stamp. *Baker v. Jardine*, 13 East, 235 n. So, an agreement by several for a subscription to one common fund. *Davis v. Williams*, 13 East, 232. So, an agreement of reference by all the underwriters on one policy. *Goodson v. Forbes*, 6 Taunt. 171. So, a bond by several obligors in a penalty conditioned for the performance of certain acts by each and every of them. *Bowen v. Ashley*, 1 N. R. 274; and see *Stead v. Liddard*, 1 Bing. 196. So, an agreement by three persons, in consideration that A. would pay a certain debt and costs, to indemnify A. to the extent of 50*l.*, to be paid separately by each with one-fourth of the costs, requires only one stamp. *Ramsbottom v. Davis*, 4 M. & W. 584. A release by several commoners of their respective rights, to make them competent witnesses, required only one stamp. *Carpenter v. Buller*, 2 M. & Rob. 298. And a single release of all encroachments by persons who had severally encroached on a common, made to the trustees of the commoners in general, was held to require only one stamp. *Doe d. Croft v. Tidbury*, 14 C. B. 304. See also *Thomas v. Bird*, 9 M. & W. 68. So, where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them. *Allen v. Morrison*, 8 B. & C. 565. So, where several shareholders convey their interests by one deed, only one *ad valorem* stamp for the total amount is necessary. *Wills v. Bridge*, 4 Exch. 193. See also *Freeman v. Int. Rev. Coms.*, L. R., 6 Ex. 101.

When an agreement refers to another document, and the two papers form, in fact, but one agreement, it is sufficient if one of them only bears a stamp. *Peate v. Dicken*, 1 C. M. & R. 422. The document might, however, require a stamp as a schedule, *vide Schedule, post*, p. 253. But where a paper contains several contracts, and consequently requires several stamps, and only one is impressed upon it, that stamp applies to the contract only on which the stamp is impressed. *Powell v. Edmunds*, 12 East, 6. Where a

paper contains a number of independent contracts with different tenants, though under the same general terms of holding, and there is but one stamp upon it, it is matter of evidence to which contract the stamp applies, and the juxtaposition of the stamp is to be regarded. *Doe d. Copley v. Day*, 13 East, 241; and now see sect. 7, *ante*, pp. 212, 213. And if it is uncertain to which the stamp applies, the paper is inadmissible. *Shipton v. Thornton*, 9 Ad. & E. 331. The several admissions of five corporators, as freemen, were written on the same paper with only one stamp; such stamp was held to apply to the first admission only, and the others could not be read. *R. v. Reeks*, 2 Ld. Raym. 1445; and see *Perry v. Bouchier*, 4 Camp. 80; *Waddington v. Francis*, 5 Esp. 182. To a stamped agreement to refer a question to A. the parties some days afterwards added a memorandum appointing B. instead of A.: held that one stamp was sufficient. *Taylor v. Parry*, 1 M. & Gr. 604. Where the defendant made in his own name a single agreement as to goods of his own and also goods of himself and partners, the whole of the goods forming part of the cargo of one ship, and signed in the name of the firm: held, in an action on it against him alone, that only one stamp was necessary. *Shipton v. Thornton*, 9 Ad. & E. 314.

Number of words.] As the Stamp Act, 1870, contains no provision charging progressive duty, the number of words in any instrument chargeable under that Act is now immaterial.

Foreign instruments.] Under sect. 17 (*ante*, p. 209), no instrument, wherever executed, relating to any property situate, or to any matter or thing done or to be done, in the United Kingdom, shall be given in evidence unless stamped. If a stamp is necessary to render an instrument valid in one of the British colonies, it has been held that it cannot be received in evidence without that stamp here. *Clegg v. Levy*, 3 Camp. 167; *Alves v. Hodgson*, 7 T. R. 241. So, where a foreign contract is void for want of a foreign stamp, it will also be void in this country. *Bristow v. Sequeville*, 5 Exch. 275. But as a general rule our courts do not take notice of foreign revenue laws; therefore an unstamped receipt, given in France, will be evidence here, though the French law requires that it should be stamped. *James v. Catherwood*, 3 D. & Ry. 190.

Under sect. 17 (2, a), an instrument first executed abroad may be stamped within two calendar months after its first arrival in the United Kingdom, without the payment of any penalty. A contract made in a British ship at sea is in the same position with regard to a stamp as one made abroad; see *Ximenes v. Jaques*, 1 Esp. 311.

As to the stamps required by foreign bills, promissory notes, charter-parties, and policies of insurance, see under those respective heads.

Value, how ascertained.—Statement of.] By sects. 11, 12, foreign or colonial currency is to be valued according to the rate of exchange, and stock, &c., is to be valued at the average price at the date of the instrument. By sect. 13, an instrument stating the value so estimated and stamped accordingly, is *prima facie*, duly stamped.

Denoting Stamp.] This is used, under sect. 14, to indicate that an instrument which would, *prima facie*, be liable to higher duty is, in fact, correctly stamped, by reason of the higher duty having been paid on some other instrument. See *Duplicate*, *post*, p. 240.

Adjudication Stamp.] Under sect. 18 (1), (2), (3), the Commissioners of Inland Revenue may be required, without the payment of any fee, to affix

a stamp on any executed instrument, denoting that it is not liable to any duty, or to assess the duty thereon, and, on payment thereof, to affix thereto a stamp denoting that the full amount of duty has been paid. (4.) "Every instrument stamped with the particular stamp denoting either that it is not chargeable with any duty or is duly stamped, shall be admissible in evidence and available for all purposes, notwithstanding any objection relating to duty." The section does not, however (5, *b. c.*), apply to an instrument chargeable with duty, and made as security without limit, nor to an instrument which may not be stamped after execution. See *Prudential Assurance, &c., Co. v. Curzon*, 8 Exch. 97; 22 L. J., Ex. 85; *Morgan v. Pike*, 14 C. B. 473; 23 L. J., C. P. 64. It may be observed that by sect. 19 an appeal is given from the decision of the Commissioners to the Court of Exchequer, which court is now merged in the Queen's Bench Division of the High Court, *vide ante*, p. 184.

Proper Denomination.] Sect. 9. "(1.) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available for an instrument of any other description. (2.) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated."

As to bills of exchange bearing a stamp or a wrong denomination, see *post*, pp. 226, 227.

Impressed and adhesive Stamps.] Sect. 23. "Except where express provision is made to the contrary, all duties are to be denoted by impressed stamps only."

Adhesive stamps are allowed in the cases of the following instruments: agreements bearing 6*d.* stamp; agreements or leases bearing 1*d.*, or for furnished houses, &c., bearing 2*s.* 6*d.* stamp; cheques and other bills of exchange payable on demand; foreign bills of exchange; charter-parties; contract notes; copies of registers of baptism, &c.; cost-book mine transfers; delivery orders, and warrants for goods; policies of insurance (except sea policies); protests on bills, and notarial acts; receipts.

By 45 & 46 Vict. c. 72, s. 13 (2), (extending the provisions of 44 & 45 Vict. c. 12, s. 47), adhesive postage stamps "to a proper amount may be used to denote any stamp duties of an amount not exceeding 2*s.* 6*d.*, which may legally be denoted by adhesive stamps, not appropriated by any word or words on the face of them to any particular description of instrument."

Adhesive stamps, how cancelled.] Sect. 24. (1.) "An instrument, the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time." By 45 & 46 Vict. c. 72, s. 14 (1), where the stamp duty is denoted by two or more adhesive stamps, each stamp is to be cancelled in the manner above stated, and so that it shall be rendered incapable of being used for any postal purpose.

It will be seen that under these sections cancellation is not imperative; it merely obviates the necessity of adducing evidence that the stamp was

affixed at the proper time. *Marc v. Rouy*, 31 L. T., N. S. 372; M. T. 1874, Q. B. See further provision in the case of foreign bills, sect. 51, and decisions thereon, *post*, p. 226.

The several sections allowing the use of adhesive stamps enact by whom the same are to be respectively cancelled. In general the person first signing the instrument is the proper person to cancel the stamp; in the case, however, of charter-parties the last person executing is to cancel the stamp. See sect. 66, *post*, p. 233.

Time of stamping.] By sect. 15, an instrument may in general be stamped by the Commissioners of Stamps with an impressed stamp, after execution, on payment of the duty and a penalty, as to which *vide infra*; and instruments first executed abroad may be stamped within two calendar months after their first arrival in the United Kingdom without the payment of any penalty. If an instrument bear a proper impressed stamp when produced at the trial, it is sufficient, though it was not stamped when executed, provided the commissioners are not expressly prohibited from subsequently affixing a stamp. *R. v. Chester*, Bp. of, 1 Stra. 624; and see *Rogers v. James*, 7 Taunt. 147. The court will not inquire whether the penalty has been paid, or whether the stamp has been affixed in proper time, but will receive the instrument in evidence, when the stamp is not required by statute to be affixed within a certain time. *R. v. Preston*, 5 B. & Ad. 1028; *Rose v. Tomlinson*, 3 Dowl. 49; *Lacy v. Rhys*, 4 B. & S. 873, Ex. Ch., *post*, p. 250. But with regard to an instrument to which a stamp cannot by law be subsequently affixed, an inquiry as to the time of affixing is admissible. *Green v. Davies*, 4 B. & C. 235. And as an adhesive stamp cannot in general be applied to an instrument after its execution, it would seem that in this case an inquiry as to when the stamp was affixed is admissible. Express evidence as to the time of the affixing of the stamp is required by sect. 24 (*ante*, p. 215), unless it has been cancelled as required by that section. But where, as in the case of foreign bills of exchange, an adhesive stamp is to be affixed before negotiation in this country, if the stamp appears on the bill at the trial, this is, *prima facie*, sufficient evidence. *Bradlaugh v. De Rin*, L. R., 3 C. P. 286.

Penalty for stamping.] By sect. 15 (1), in general, the penalty for stamping after execution is 10*l.*, and where the duty to be paid exceeds 10*l.*, interest is chargeable on the duty at the rate of 5*l.* per cent. per annum from the day on which the instrument was first executed to the time when the interest is equal to the amount of unpaid duty. But (2, b), the Commissioners of Inland Revenue are empowered to remit the whole or any part of the penalty, if the instrument is brought to them to be stamped within a year of its first execution. As to instruments first executed abroad, *vide* sect. 15, *supra*.

Some instruments may be stamped within a certain time of their execution without penalty; and in the case of others the amount of the penalty differs from that above stated. The special enactments relating to these instruments will be found under their respective heads, *post*, pp. 218 *et seq.*

Stamping at the Trial.] By the Stamp Act, 1870, sect. 16 (1), "Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty

payable by law on stamping the same as aforesaid, and of a further sum of 1*l.*, be received in evidence, saving all just exceptions on other grounds. (2.) The officer receiving the said duty and penalty shall give a receipt for the same." * * * (3.) "Upon production to the Commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly." This section is a re-enactment of the provisions of the C. L. P. Act, 1854, ss. 28, 29.

By stat. 39 & 40 Vict. c. 6, s. 2, this section is applied to a policy of sea insurance; the penalty for stamping being 100*l.*

Time and mode of objecting to the Stamp.] After proof of the due execution of an instrument, the rule is that it lies on the opponent to point out any objection to the stamp. If indications of an effaced stamp appear, it is for the judge to decide whether he is satisfied of its admissibility. *Doe d. Fryer v. Coombs*, 3 Q. B. 687; *Wilson v. Smith*, 12 M. & W. 401. And the objection must be made before the paper is read in evidence. *Foss v. Wagner*, 7 Ad. & E. 116, n. But where the objection does not appear except on extrinsic evidence, the objection may be made after it has been read. *Field v. Woods*, *Id.* 114. In that case the objection was that a cheque was post-dated. Interlocutory proof in support of the objection must be received *instantly*, and the question be decided by the judge. *Bartlett v. Smith*, 11 M. & W. 483. The court will grant a new trial where the evidence is left to the jury as part of the defendant's case. *Id.* If, however, the objection is not a mere stamp objection, as where the existence of the original stamped policy of insurance, a copy of which is tendered in evidence, is disputed, the whole question must be left to the jury. *Stowe v. Querner*, L. R. 5 Ex. 155, cited *ante*, p. 10. A stamp objection must be taken at the earliest possible moment. *Robinson v. Vernon, Ltd.*, 7 C. B., N. S. 235; 29 L. J., C. P. 310. Where a probate has been read without objection, its evidence could not be excluded by afterwards showing that the amount of personality passing under the will exceeded the amount covered by the stamp. S. C. Where an instrument bearing an agreement stamp only, was put in as such, and the defendant's counsel afterwards relied on it as a lease, it was held that the objection ought then to be taken to the stamp, and was too late on a motion for a new trial. *Doe d. Philip v. Benjamin*, 9 Ad. & E. 644. The fact that the defendant was a party to the fraud on the revenue will not estop him from objecting. *Steadman v. Duhamel*, 1 C. B. 888.

It was formerly competent for the parties to overlook the want of a stamp or of a proper stamp; but by sect. 16 (1), *ante*, p. 216, the objection is now to be taken by the officer whose duty it is to read the document at the trial.

By Rules 1883, O. xxxix. r. 8, "A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." The C. L. P. Act, 1854, s. 31, which was in like terms, is repealed by 46 & 47 Vict. c. 49; it would seem however that its effect is retained by *Id.* s. 5 (b), if rule 8 is *ultra vires*, as contravening J. Act, 1875, s. 20, *ante*, p. 143. Where the document is formally tendered in evidence and rejected by the judge on account of the insufficiency of the stamp, the ruling is, of course, still open to review. *Sharples v. Rickard*, 2 H. & N. 57; 26 L. J. Ex. 302. After the expression of the judge's opinion adverse to the reception of the document, counsel must formally tender it in evidence and require a note to be taken of the tender, otherwise the point will be of no avail on a motion for a new trial. *Campbell v. Loader*, 34 L. J., Ex. 50.

Stamp objections by the officer of the court are sometimes avoided by the consent of the parties to the use of copies of unstamped originals, for the officer of the court can only take such objections as the parties might have taken if this section had not been enacted. If an admitted copy of a document be put in evidence, and it afterwards appears that the original was not duly stamped, the unstamped copy is still admissible. *Travis v. Hargreave*, 4 F. & F. 1078; *cor. Keating, J.* Where, however, the objection appeared on the face of a special case, the court refused to allow the case to be argued. *Nixon v. Albion Marine Insurance Co.*, L. R., 2 Ex. 338.

The stamp duties chargeable on those instruments which are most frequently used in evidence at *Nisi Prius* will be found below, the instruments being arranged in alphabetical order.

Affidavit.

Affidavit or Statutory declaration made under the provisions of 5 & 6 Will. 4, c. 62:—2a. 6d.

Exemptions.—These include affidavit (1) made for the immediate purpose of being filed, read, or used in any court, &c.; (2) required by law and made before a justice of the peace; (3) required at the Bank of England or Ireland to prove the death of, or to identify any proprietor of stock transferable there, or to remove any other impediment to the transfer of any such stock; (4) relating to the loss, mutilation, or defacement of any bank-note or bank post-bill; also (5) declaration required to be made pursuant to any act relating to marriages in order to a marriage without licence.

Agreement.

Agreement or Contract, accompanied with a deposit. See *Mortgage, &c.*, and sect. 105, *post*, p. 244, *et seq.*

Agreement for a lease, or for any letting. See *Lease*, and sect. 96, *post*, pp. 240, 241.

“*Agreement or Contract* made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways:—6d.”

“*Agreement, or any Memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument:—6d.*”

Sect. 36. “The duty of 6d. upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.”

The exemptions contained in the schedule are treated at length, *post*, p. 221, *et seq.*

What are Agreements within the meaning of the Stamp Act.] Many documents, although they may be assistance in the proof of an original or substituted contract do not require to be stamped as agreements. Of this kind are directions and licences, which excuse what would otherwise be a trespass or a breach of contract. So also, memoranda of agreements, the terms of which do not appear to have been mutually and finally approved of by the contracting parties, before or at the time when these memoranda

were committed to writing, are regarded as mere proposals, and may be admitted in evidence without a stamp. In *Ingram v. Lea*, 2 Camp. 521, where a customer wrote down upon a slip of paper a description of the goods which he had ordered, which paper he signed and delivered to the shop-keeper, it was admitted in evidence without a stamp. In *Parker v. Dubois*, 1 M. & W. 31, where the defendant, in answer to an application to that effect, wrote back authorising the plaintiff to pay a call upon shares which the defendant had agreed to purchase from him, it was held that the letter required no stamp. In *Beihell v. Blencowe*, 3 M. & Gr. 119, a memorandum allowing the defendant, a projected lodger, to leave lodgings without any notice if he saw reason to suspect embarrassment in the landlord, and signed by the landlord, was, though unstamped, admitted. In *Walker v. Rostron*, 9 M. & W. 411, a letter written by the buyer of goods to his factors, directing them to appropriate the proceeds of the sale of the goods to the payment of bills accepted by the buyer, if these bills had not previously been honoured, was held not to require a stamp. But it would seem under the present act to require a stamp under sect. 48 (*post*, p. 225), as a bill payable on demand, *vide post*, pp. 228, 229. In *Hill v. Ramm*, 5 M. & Gr. 789, a memorandum signed by a tenant authorising his landlord, upon condition of withdrawing a distress, to re-enter and distrain in case of default in payment of the rent by a certain day, was held not to be an agreement requiring a stamp. In *Fishwick v. Milnes*, 4 Exch. 825, a document signed by a tenant, by which he requested a bailiff to forbear selling his goods, and consented that they should remain on the premises in his possession for a period of three months, when he, the tenant, would give them up, and pay all costs and charges attending the distress, was admitted without a stamp. In *Edgar v. Blick*, 1 Stark, 464, a prospectus containing the terms upon which the plaintiff undertook to introduce applicants to partnerships or situations, was admitted unstamped, though these terms were adopted in the agreement upon which the action was brought. In *Clay v. Crofts*, 20 L. J., Ex. 361, a prospectus of the terms of a school had been shown to the father of two boys, upon which he agreed to place them in the school, subject to a slight reduction in the terms of payment. It was held that the prospectus might be put in evidence without a stamp. In *Ramsbottom v. Tunbridge*, 2 M. & S. 434, a lease of premises was sold by auction, and the auctioneer handed to the buyer a written paper specifying the term, the rent, and the extent of the premises. This paper not having been signed, the court allowed it to be received in evidence unstamped. But in *Ramsbottom v. Mortley*, *Id.* 445, where a similar paper was signed by the auctioneer, the court thought that it must be stamped, even although the memorandum did not satisfy the Statute of Frauds. *Accord. Glover v. Halkett*, 2 H. & N. 487; 26 L. J., Ex. 416.

In *Vollans v. Fletcher*, 1 Exch. 21, where a shareholder proved his title to shares by his letter of application and the letter of allotment in reply, in which was contained a power for the company, in default of payment of the deposit, to cancel the allotment, a term not alluded to in the first letter, an objection, that the letters required a stamp, was overruled. See *Duke v. Andrews*, 2 Exch. 290; *Willey v. Parratt*, 5 Exch. 211. In *Chaplin v. Clarke*, 4 Exch. 403, a letter of allotment of shares, the letter of application having been lost, was admitted without a stamp. See also *Moore v. Garwood*, *Id.* 681, Ex. Ch. See now, however, *Letter of Allotment*, *post*, p. 243. Where the plaintiff made a memorandum in writing of an offer on his part to let to the defendant a piece of land upon the same conditions as those which had been agreed to by the defendant and a third person, to which offer the defendant afterwards verbally assented, the memorandum

was admitted without a stamp. *Drant v. Brown*, 3 B. & C. 665; *Hawkins v. Warre*, *Id.* 690; *Hudspeth v. Yarnold*, 9 C. B. 625.

In *Vaughton v. Brine*, 1 M. & Gr. 359, a resolution, signed by the provisional committee of a company to employ the plaintiff as secretary was received in evidence unstamped, as not amounting to an agreement. Where a minute was made at a meeting, of a resolution, by the defendants and others, to make an alteration in the terms of a previous contract between them and the plaintiff, and to allow him an additional sum for extra trouble, and this minute was read over to the plaintiff, and assented to by him, Rolfe, B., held, at *Nisi Prius*, that the resolution could not be admitted without a stamp. *Lucas v. Beach*, *Id.* 417. And in *Knight v. Barber*, 16 M. & W. 67, the defendant, after having given the plaintiff a verbal order for 50 shares in a railway company, signed a memorandum that he had bought of the plaintiff 50 shares in the company at 10*l.* a share, which memorandum was handed to the plaintiff. It was held that this memorandum required an agreement stamp. "A written instrument, to come within the terms of this clause of the Stamp Act, must have been made with the intention of containing within itself the terms of an agreement between the parties." *Id.* 70, *per Parke, B.* In *Chadwick v. Clarke*, 1 C. B. 700, a draft agreement forwarded by the plaintiff to the defendant's solicitor, and sent back by him on the same day with certain alterations, to which the plaintiff did not object, was held inadmissible (although it had no signature) for want of an agreement stamp. And *per curiam* the words "under hand only" in this part of the Stamp Act, merely refer to instruments not under seal. But see 6 C. B. 700, *n.* An agreement to enlarge the time for performing another agreement requires a new stamp, where the former one required to be stamped. *Bacon v. Simpson*, 3 M. & W. 78.

An instrument operating as an *attornment* only, requires no stamp. *Doe d. Linsey v. Edcard*, 5 Ad. & E. 95; *Doe d. Wright v. Smith*, 8 Ad. & E. 255. So, a mere acknowledgment. Thus, in an action against an attorney, the plaintiff gave in evidence the following unstamped letter:—"I have this day received a bill of exchange for 300*l.*, drawn, &c., which I hold as your attorney to recover the value of from the respective parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper: Held, that this letter was a mere acknowledgment of the duty which the party took upon himself to perform, and that it therefore required no stamp. *Langdon v. Wilson*, 7 B. & C. 640, *n.*; *Mullett v. Huchison*, 7 B. & C. 639; *De Porquet v. Page*, 15 Q. B. 1073; 20 L. J., Q. B. 28. So, a memorandum, "I acknowledge that you have for my accommodation accepted a bill for, &c., and I will provide for the same when due." *Notley v. Webb*, 5 C. B. 834. So, a memorandum put in to show the assent of a party to an act done under a previous agreement by him, already in proof, in which the terms of the agreement are recapitulated. *Marshall v. Powell*, 9 Q. B. 779. So, an acknowledgment by the defendant of the deposit of goods with him requires no stamp though given in evidence in an action against him for not redelivering them. *Blackwell v. M'Naughtan*, 1 Q. B. 127. But now see *Warrant for Goods*, *post*, p. 239. "Borrowed of A. 100*l.* for one or two months. Cheque for 100*l.* on—bank:—" Held an acknowledgment only, and not an agreement or promissory note. *Hyme v. Dewdney*, 21 L. J., Q. B. 278. But an acknowledgment signed by the defendant, that he holds the land as tenant to the plaintiff on certain terms, cannot be put in evidence by the defendant to show that a notice to quit was irregular, without an agreement stamp. *Doe d. Frankis v. Frankis*, 11 Ad. & E. 792. And such an agreement may now require a lease stamp, *vide post*, p. 241. A broker's note of the purchase of shares, sent to his

principal, does not require an agreement stamp; *Tomkins v. Savory*, 9 B. & C. 704; it is now, however, liable to a duty of 1d. *Vide Contract Note, post*, p. 234.

The 9 Geo. 4, c. 14, s. 8, exempts from agreement duty any memorandum or other writing made necessary by that act; thus, a qualified promise to pay, put in evidence not to prove the debt but to rebut the Statute of Limitations, is exempt. *Morris v. Dixon*, 4 Ad. & E. 845. See also cases *post*, pp. 229, 230. This exemption is continued by sect. 3 of the present act, *vide ante*, p. 208.

First Exemption.] "Agreement or memorandum the matter whereof is not of the value of 5*l.*"

Under 55 Geo. 3, c. 184, sched. 1, the amount was 20*l.*, and under that act many of the cases cited below were decided.

The statute only applies when the value of the contract is measurable. Thus a contract of marriage may be proved by unstamped letters. *Oxford v. Cole*, 2 Stark. 351. The value must appear on the instrument, or be capable of being ascertained at the time of making. *Parke, B., Taylor v. Steele*, 16 M. & W. 665; *Lloyd v. Mansel*, 1 L. M. & P. 130; 19 L. J., Q. B. 192. Where the agreement was to give up a shop and goodwill for 7*l.*, and not to open a shop of the same description under a forfeiture of 20*l.*, it was held not to require a stamp; for the forfeiture is not of the value of the matter. *Pemberton v. Vaughan*, 10 Q. B. 87. So, an agreement to pay interest at 1*s.* per £1 per month, if a bill for 100*l.*, to be discounted, should not be paid at maturity. *Semple v. Steinau*, 8 Exch. 622; 22 L. J., Ex. 224. The general regulations of a free school under which the master is appointed, signed by him and the trustees, may be proved against him, though unstamped. *Browne v. Dawson*, 12 Ad. & E. 624. A memorandum by a carrier of the receipt of goods worth 20*l.* might be given in evidence, to show the terms upon which they were received, without a stamp; the carriage being of less amount. *Latham v. Rutley*, Ry. & M. 13. So in the case of a wharfinger. *Chadwick v. Sills*, *Id.* 15; but in this latter case a 3*d.* stamp would now generally be required, *vide Warrant for Goods, post*, p. 239. A memorandum relating to the warehousing of goods worth more than 20*l.* was admissible if the warehouse rent were less. *Baldwin v. Alsager*, 13 M. & W. 365. An agreement to indemnify a bailiff who distrained for 1*l.* 4*s.* rent, was held to require no stamp; for the value is uncertain. *Cox v. Bailey*, 6 M. & Gr. 193. So, an agreement to do work of uncertain quantity at 1*l.* 14*s.* per rod. *Liddiard v. Gale*, 4 Exch. 816. But an agreement to indemnify A. from all costs, charges, damages, or other expenses, which he might incur as bail for B., required an agreement stamp, the arrest of B. being for more than 20*l.*, though the costs, &c., incurred did not amount to that sum. *Williams v. Jarrett*, 5 B. & Ad. 32. Where the agreement relates to granting a lease, the rent is the matter on which the value is to be calculated. *Mayfield v. Robinson*, 7 Q. B. 486; *Burton v. Reeve*, 16 M. & W. 307. But if the period of tenancy be fixed, the rent multiplied by the time is the test of value. *Doe d. Marlow v. Wiggins*, 4 Q. B. 366, 372, 377. As, however (by sect. 96, *post*, p. 241), agreements for leases for terms not exceeding 35 years now require lease stamps, these decisions will not frequently be applicable. See further, *post*, pp. 241, 242.

Second Exemption.] "Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant."

An assignment of an apprentice is not within this exemption. *R. v. S. Paul's, Bedford*, 6 T. R. 452. Firemen and stokers on board foreign steamers

are within it. *Wilson v. Zulusta*, 14 Q. B. 405; *Cornforth v. Danube & Black Sea Ry. Co.*, 2 F. & F. 197. So, a person hired to take charge of glebe, dairy, &c., at a salary and share of clear profit. *R. v. Wortley*, 2 Den. C. C. 333; 21 L. J., M. C. 44.

By the general exemption (3), at the end of the schedule, "bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of Her Majesty's colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer," are exempt from all duty.

Third Exemption.] "Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise."

Cases within the third Exemption.] An undertaking to guarantee the payment of goods to be furnished to third persons. *Warrington v. Furber*, 8 East, 242; *accord. Sadler v. Johnson*, 16 M. & W. 775; *Chatfield v. Cox*, 18 Q. B. 321; 21 L. J., Q. B. 279. An agreement by A. to take half of certain goods bought by B. on their joint account, and to furnish B. with half the amount in time for payment. *Venning v. Leckie*, 13 East, 7. An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods upon different terms. *Whitworth v. Crockett*, 2 Stark. 431. An agreement for the sale of rape oil, not yet expressed from the seed. *Wilks v. Atkinson*, 6 Taunt. 11. An agreement to make a chattel and deliver it within a certain time; *Pinner v. Arnold*, 2 C. M. & R. 613; *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; though it was formerly held that a contract to make goods for sale was not within the exemption. *Buxton v. Bedall*, 3 East, 303. An agreement for the sale of chimney-pieces, the vendor "to finish them in a tradesmanlike manner." *Hughes v. Breeds*, 2 C. & P. 159. A receipt for the price of a horse containing a warranty of soundness. *Skrine v. Elmore*, 2 Camp. 407. An agreement for a crop growing in a close, and conferring no interest in the land. *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 829; *Watts v. Friend*, 10 B. & C. 446; *Jones v. Flint*, 10 Ad. & E. 753. An agreement for the purchase of timber, though the trees are growing. *Smith v. Surman*, 9 B. & C. 561. An agreement to supply a house with water. *W. Middlesex Waterworks v. Suwerkropp*, M. & M. 409. Some of the above cases were decided on the Stat. of Frauds, ss. 4 and 17; but they are authorities on the Stamp Act also. A memorandum by the defendant of an advance made to him by the plaintiff, an auctioneer, on receipt of books for sale by the plaintiff by auction, requires no stamp. *Southgate v. Bohn*, 16 M. & W. 34.

Cases not within the third Exemption.] An agreement by a principal to provide for certain bills drawn upon his factor, if certain goods, then either in the factor's possession or about to be placed there, should remain unsold at the time of the bills falling due; for the exemption is confined to instruments whereof the sale of goods is the primary object. *Smith v. Cator*, 2 B. & A. 778. An agreement for the sale of goods and goodwill. *South v. Finch*, 3 N. C. 506. A contract for the erection of fixtures; *semb. per Parke, B.*, *Pinner v. Arnold*, 2 C. M. & R. 613; or the sale of railway shares, *Knight v. Barber*, 16 M. & W. 66. So, an agreement for the sale of growing crops, conferring an interest in the land; *Crosby v. Wadsworth*, 6 East, 602; *Waddington v. Bristol*, 2 B. & P. 453; *Emmerson v. Heelis*, 2 Taunt. 38; or a sale of growing underwood, to be cut by the purchaser; *Scorell v. Boxall*, 1 Y. & J. 396; or an agreement to print a book, and supply the paper;

Clay v. Yates, 1 H. & N. 73 ; 25 L. J., Ex. 237 ; (decided on the Statute of Frauds, ss. 4 and 17). So, a contract under seal for the sale of goods. *Per Bayley, J.*, *Clayton v. Burtenshaw*, 5 B. & C. 45.

Fourth Exemption.] "Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coast-wise from port to port in the United Kingdom." See also the exemptions given by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 9, and which are retained by the Stamp Act, 1870, s. 3 (*ante*, p. 208).

Appraisement.

"*Appraisement or valuation* of any property, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificer's work whatsoever," must be stamped as follows: where the amount of appraisement does not exceed 5*l.*,—3*d.* ; where, it exceeds 5*l.* and does not exceed 10*l.*,—6*d.* ; 10*l.* and not 20*l.*,—1*s.* ; 20*l.* and not 30*l.*,—1*s.* 6*d.* ; 30*l.* and not 40*l.*,—2*s.* ; 40*l.* and not 50*l.*,—2*s.* 6*d.* ; 50*l.* and not 100*l.*,—5*s.* ; 100*l.* and not 200*l.*,—10*s.* ; 200*l.* and not 500*l.*,—15*s.* ; exceeds 500*l.*,—1*l.*

Exemptions.—Appraisement (1) made for the information of one party only, and not being in any manner obligatory as between parties, either by agreement or operation of law ; (2) made under order of Admiralty Court ; (3) made for ascertaining legacy or succession duty.

Where nothing is referred to but the mere value of goods and the repairs of a farm, an appraisement stamp is proper, and not an award stamp. *Leeds v. Burrows*, 12 East, 1.

Award.

An *Award* must be stamped as follows: where the amount or value of the matter in dispute does not exceed 5*l.*,—3*d.* ; where it exceeds 5*l.* and does not exceed 10*l.*,—6*d.* ; 10*l.* and not 20*l.*,—1*s.* ; 20*l.* and not 30*l.*,—1*s.* 6*d.* ; 30*l.* and not 40*l.*,—2*s.* ; 40*l.* and not 50*l.*,—2*s.* 6*d.* ; 50*l.* and not 100*l.*,—5*s.* ; 100*l.* and not 200*l.*,—10*s.* ; 200*l.* and not 500*l.*,—15*s.* ; 500*l.* and not 750*l.*,—1*l.* ; 750*l.* and not 1,000*l.*,—1*l.* 5*s.* ; and where it shall exceed 1,000*l.*, and in any other case not above provided for,—1*l.* 15*s.*

It seems that an award ordering something to be done other than or as well as the payment of money, must bear the duty of 1*l.* 15*s.*

The appointment of an umpire, made in writing by two arbitrators requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704. An agreement stamp is not necessary to an arbitration bond which, besides the usual covenants, contains an agreement as to the payment of costs. *Re Wansborough*, 2 Chitty, 40. A paper drawn up by a person appointed by two parties to ascertain the amount of an account requires an award stamp. *Jebb v. M'Keirnan*, M. & M. 340. But not if the account is not intended to bind them. *Goodyear v. Simpson*, 15 M. & W. 16. The opinion of counsel, by which parties agree to abide, does not require an award stamp. *Semb. Boyd v. Emmerson*, 2 Ad. & E. 184. Nor does a certificate by a referee, agreed on at the trial, as to the amount at which a verdict, taken at the trial, is to stand. *Salter v. Yeates*, 5 Dowl. 291 ; and see *Tomes v. Hawkes*, 10 Ad. & E. 32. An award of land by commissioners of inclosure only requires an

award stamp and not an *ad valorem* stamp, as on a sale. *Doe d. Ld. Suffield v. Preston*, 7 B. & C. 392.

By the C. L. P. Act, 1854, s. 30, no document made or required under the provisions of that Act shall be liable to any stamp duty. Sects. 3—17 relate to arbitration.

Bank Note, Bill of Exchange, Cheque, & Promissory Note.

Bank Note.—For money not exceeding 1*l.*,—5*d.*; exceeding 1*l.* and not 2*l.*,—10*d.*; 2*l.* and not 5*l.*,—1*s.* 3*d.*; 5*l.* and not 10*l.*,—1*s.* 9*d.*; 10*l.* and not 20*l.*,—2*s.*; 20*l.* and not 30*l.*,—3*s.*; 30*l.* and not 50*l.*,—5*s.*; 50*l.* and not 100*l.*,—8*s.* 6*d.*

Banker.—Sect. 45. "The term 'banker' means and includes any corporation, society, partnership, and persons, and every individual person carrying on the business of banking in the United Kingdom."

Bank Note.—"The term 'bank note' means and includes—(1.) Any bill of exchange or promissory note issued by any banker, other than the Governor and Company of the Bank of England, for the payment of money not exceeding 100*l.* to the bearer on demand. (2.) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of issuing thereof, to the payment of money not exceeding 100*l.* on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever such bill or note is drawn or made."

Sect. 46. "A bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorised to issue unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of such re-issuing."

The provisions relating to notes issued by private banks will be found in 7 & 8 Vict. c. 32; 8 & 9 Vict. cc. 37, 38; and 17 & 18 Vict. c. 83, ss. 11, 12. Their issue is now restricted by 7 & 8 Vict. c. 32, ss. 10, 28.

*"Bill of Exchange.—Payable on demand,—1*d.*"*

This includes cheques and orders for the payment of money, see sect. 48, *post*, p. 225, and also by 45 & 46 Vict. c. 61, s. 10 (replacing, see sects. 96, 97(3)(a), 34 & 35 Vict. c. 74, s. 2, except so far as relates to stamp duty), bills payable at sight or on presentation. A draft payable generally is payable on demand. *Whitlock v. Underwood*, 2 B. & C. 157.

A draft payable on demand, whether to bearer or order, is not rendered invalid by being post dated; for the act deals with such an instrument only as it appears on its face when tendered in evidence, without reference to any collateral agreement or consideration by which its apparent operation may be affected; *Bull v. O'Sullivan*, L. R., 6 Q. B. 209; *Gatty v. Fry*, 2 Ex. D. 265; see also *Currie v. Misa*, 1 Ap. Ca. 554, D. P. The stats. 31 Geo. 3, c. 25, s. 4, and 55 Geo. 3, c. 184, s. 13, and schedule, which required that a cheque should bear date on or before the day on which the same should be issued (and on which *Field v. Woods*, 7 Ad. & E. 114, and the previous cases were decided) have been repealed, and the Stamp Act, 1870, contains no similar enactment.

"Bill of Exchange of any other kind whatsoever (except a Bank Note, as to which vide supra), and Promissory Note of any kind whatsoever (except

a Bank Note)—drawn, or expressed to be payable, or actually paid or endorsed, or in any manner negotiated in the United Kingdom :

Where the amount or value of the money for which the bill or note is drawn or made does not exceed 5*l.*,—1*d.* ; exceeding 5*l.* and not 10*l.*,—2*d.* ; 10*l.* and not 25*l.*,—3*d.* ; 25*l.* and not 50*l.*,—6*d.* ; 50*l.* and not 75*l.*,—9*d.* ; 75*l.* and not 100*l.*,—1*s.* ; exceeds 100*l.*—for every 100*l.*, and also for any fractional part of 100*l.*, of such amount or value,—1*s.*

Exemptions.—These include notes and bills of the Banks of England and Ireland ; certain drafts, orders and letters drawn by bankers ; dividend warrants for dividends on Government securities ; bills drawn by certain public departments (extended by 45 & 46 Vict., c. 72, s. 9), and companies ; and coupons or warrants for interest attached to and issued with any security.

The statute 10 Geo. 4, c. 56, s. 37, does not exempt from duty drafts payable to bearer given by a friendly society to their members. *Att.-Gen. v. Gilpin*, L. R., 6 Ex. 193. This decision will apply to the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15, (2*a*), and the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 41, the corresponding provisions being similar in terms.

Bill of Exchange.—Sect. 48. “(1.) The term ‘bill of exchange’ for the purposes of this Act includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person or, to draw upon any other person for, any sum of money therein mentioned.

“(2.) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a bill of exchange for the payment of money on demand.

“(3.) An order for the payment of any sum of money, weekly, monthly, or at any other stated periods, and also any order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf, is to be deemed for the purposes of this Act a bill of exchange for the payment of money on demand.”

The corresponding provisions of the earlier Acts (55 Geo. 3, c. 184, Sched. Part 1, & 16 & 17 Vict. c. 59, Sched.) were less wide than those of the present section, for the paragraph in italics is altogether new. As to what instruments fall within the present section, *vide post*, pp. 227, *et seq.*

Promissory Note.—Sect. 49. “(1.) The term ‘promissory note’ means and includes any document or writing (except a bank note) containing a promise to pay any sum of money.

“(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a promissory note for the said sum of money.”

The paragraph in italics is new, and the earlier provision (in 55 Geo. 3, c. 184, Sched. Part 1), corresponding to sub-sec. (2), *supra*, applied only

to notes payable to bearer or to order, and definite and certain, and not amounting in the whole to 20*l*. Instruments in the form of notes and held to be agreements, were, except in the case of those expressly directed to be promissory notes, exempt from the note stamp, but liable to be stamped as agreements. As to what instruments fall within the present section, *vide post*, pp. 229, 230.

Bill payable on demand, cheque, &c., adhesive stamp on.—Sect. 50. "The fixed duty of 1*d*. on a bill of exchange for the payment of money on demand may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power."

This stamp may, under sect. 54, (2), (*post*, p. 227) be affixed and cancelled by the person to whom it is presented.

Foreign bills, adhesive stamp on.—Sect. 51. "(1.) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

"(2.) Every person into whose hands any such bill or note comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays such bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

"(3.) Provided as follows:—(a.) If at the time when any such bill or note comes into the hands of any *bond fide* holder thereof there is affixed thereto an adhesive stamp effectually obliterated, and purporting and appearing to be duly cancelled, such stamp shall, so far as relates to such holder, be deemed to be duly cancelled, although it may not appear to have been so affixed or cancelled by the proper person. (b.) If at the time when any such bill or note comes into the hands of any *bond fide* holder thereof there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for such holder to cancel such stamp as if he were the person by whom it was affixed, and upon his so doing such bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been duly cancelled by the person by whom it was affixed."

On the transferrer is imposed the duty of cancelling the stamp affixed to a foreign bill, and on the transferee of seeing that it is done. *Pooley v. Brown*, 11 C. B., N. S. 566; 31 L. J., C. P. 134.

If a foreign bill be produced at the trial bearing the proper stamp, it will be presumed that the stamp was affixed at the time required by this section; *Bradlaugh v. De Rin*, L. R., 3 C. P. 286; even though it is not properly cancelled; *Marc v. Rouy*, 31 L. T., N. S., 372, M. T. 1874, Q. B. The party objecting to the admission of the instrument on the ground that the stamp was not affixed at the proper time must plead the objection specially. S. C., *per* Blackburn, J. It seems that cancellation may be made at any time in court before verdict; *Viale v. Michael*, 30 L. T., N. S. 463, E. T. 1874, Q. B. *per Id.*

Sect. 52. "A bill of exchange or promissory note purporting to be drawn or made out of the United Kingdom is, for the purposes of this act, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."

This section obviates the objection held to be fatal in *Steadman v. Duhamel*, 1 C. B. 888.

Wrong denomination of stamp.—Sect. 53. "(1.) Where a bill of exchange

or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty and a penalty of 40s. if the bill or note be not then payable according to its tenor, and of 10*l.* if the same be so payable. (2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof."

It is sufficient if a bill so re-stamped be produced at the trial. *Haiser v. Grout*, 5 H. & N. 35; 29 L. J., Ex. 20.

Effect of want of stamp.—Sect. 54. "(1.) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall forfeit the sum of 10*l.*, and the person who takes or receives from any other person any such bill or note not being duly stamped either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

"(2.) Provided that if any bill of exchange for the payment of money on demand, liable only to the duty of 1*d.*, is presented for payment unstamped, the person to whom it is so presented may affix thereto a proper adhesive stamp, and cancel the same, as if he had been the drawer of the bill, and may, upon so doing, pay the sum in the said bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct such duty from the said sum, and such bill is, so far as respects the duty, to be deemed good and valid."

Bill in set.—Sect. 55. "When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from such duly stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from such lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of such lost or destroyed bill."

A bill drawn in England on a person abroad, and accepted by him payable in England, is an inland bill, and must bear an impressed stamp. *Amner v. Clark*, 2 C. M. & R. 468. So, conversely, a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, and does not require an impressed stamp. *Boehm v. Campbell*, Gow, 56. A foreign bill drawn and indorsed abroad, may be presented in this country by the indorsee for acceptance without being stamped, and he may sue the drawer on it for non-acceptance. *Sharples v. Rickard*, 2 H. & N. 57; 26 L. J., Ex. 302. A foreign bill may be given in evidence for a collateral purpose without a stamp, before it has been presented for payment, indorsed, transferred, or otherwise negotiated. *Griffin v. Weatherby*, L. R., 3 Q. B. 753.

The Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 97, (3), provides that nothing therein, "or in any repeal effected thereby shall affect (a.) the provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue."

What are bills, &c., within the Stamp Act, 1870.] It was the object of the legislature, in framing the provisions of 55 Geo. 3, c. 184, "to treat as promissory notes and bills of exchange, and to subject to stamp duty, such instruments as, being payable on a contingency or out of a particular fund,

could not, in strictness, fall under that denomination." *Per* Ld. Ellenborough, C. J., *Firbank v. Bell*, 1 B. & A. 36; and see *Jones v. Simpson*, 2 B. & C. 321. In considering the cases decided under that Act, with a view of ascertaining whether an instrument is now chargeable with duty or not, it must be borne in mind that the provisions of the present Act are considerably wider than those of the former one (*vide ante*, p. 225), and the cases decided on 55 Geo. 3, c. 184, cited below, where instruments were held to be entitled to exemption, must be applied subject to such modifications.

Where the instrument operates as an equitable assignment it seems not to be within the act. Thus, an order by A., addressed to his debtor on a contract for works, authorising him to pay B. the sum of 365*l.*, "being the amount of my contract, B. having advanced me that sum," was held, under 55 Geo. 3, c. 184, not to be an order for payment out of a particular fund within the Act, for it operated as an equitable assignment of the whole fund. *Diplock v. Hammond*, 2 Sm. & G. 141; 5 D. M. & G. 320; 23 L. J., Ch. 550. So, under the Stamp Act, 1870, where it was in the form, "I hereby assign to R. the sum of 40*l.*, or any other sum now due or that may hereafter become due in respect of the steam launch I am building for you." *Buck v. Robson*, 3 Q. B. D. 686, following *Brice v. Bannister*, *Id.* 569, C. A., and dissenting from *Ex pte. Shellard*, L. R., 17 Eq. 109. So, a document addressed to C., the trustee of a will, and given to F. "I hereby authorise and direct you to pay to F. or his order the sum of 140*l.* out of moneys now due, or hereafter to become due to me under the will of my late father, and before making any payment to me thereout." *Fisher v. Calvert*, 27 W. R. 301, M. R., H. S. 1879.

Before the doctrine of equitable assignment of a fund was well understood, there were decisions on 55 Geo. 3, c. 184, which conflict with those cited above. Thus, where in order to prove the payment of money pursuant to order, the following letter was given in evidence:—"Mr. B., When the mahogany, *per* Regent, is sold, you will please pay over to P. 1500*l.*, in such bills as you receive from the said sale. S. Mann." P. inclosed this letter in another addressed by him to B.; and B. in reply, wrote promising to pay over the money. The letter from P. was stamped with an agreement stamp. It was held that the letter from Mann was an order for payment of money out of a fund which might or might not be available, and ought to have been stamped accordingly. *Firbank v. Bell*, *supra*; *Butts v. Swann*, 2 B. & B. 78. So it seems that an order to pay half the net proceeds to R. & Co., "provided the same shall not exceed 5000*l.*," required a stamp. *Hutchinson v. Heyworth*, 9 Ad. & E. 375, 400.

In order however to come within 55 Geo. 3, c. 184, it was held that the instrument must be for the payment of a specified sum; and therefore where A., having consigned goods to B., sent him the following order,— "Pay to C. the proceeds of a shipment of 12 bales of goods, value about 2000*l.*, consigned by me to you;" and B., by writing, consented to pay over the full amount of the net proceeds of the goods; it was held that neither of these instruments came within the above clause. *Jones v. Simpson*, 2 B. & C. 318; and see Roscoe, Dig. Bills of Exchange, p. 31. The order in *Hutchinson v. Heyworth*, *supra*, was held sufficiently to satisfy this requisite. It has been held that an ordinary bill of exchange drawn on H. by C. for the exact amount of C.'s funds in H.'s hands does not operate as an equitable assignment of such funds. *Shand v. Du Buisson*, L. R., 18 Eq. 283. And the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 53, expressly provides that "a bill of itself does not operate as an assignment of funds in the hands of the drawee available for payment thereof," but this section has no effect on the stamp duty payable on such an instrument, *vide*, sect. 97 (3, a.), *ante*, p. 227.

It seems that an order for the payment of money sent or delivered to the person by whom it is to be paid, and not to the person to whom the payment is to be made, or any person on his behalf, is not liable to any stamp duty, unless payable *after* the date thereof, in which case it must bear a 1d. stamp. See *Hutchinson v. Heyworth*, *ante*, p. 228. A written authority by A. to defendant to pay certain sums to plaintiff out of debts from time to time accruing due from defendant to A., and a written promise by defendant to pay accordingly, were held to constitute together an agreement, and not to require a bill or note stamp. *Hamilton v. Spottiswoode*, 4 Exch. 200. See *Thompson v. Condry*, *infra*. See also *Walker v. Rostron*, 9 M. & W. 411, cited *ante*, p. 219. So, where the creditor sends an account to his debtor, requesting him, at the foot of it, to pay the amount to A. B., and hands the account to A. B. to collect it on his (the creditor's) behalf, this is not a bill of exchange within the Act. *Norris v. Solomon*, 2 M. & Rob. 266.

What are promissory notes within the Stamp Act, 1870.] The terms of the present Act are so much wider than those of 55 Geo. 3, c. 184 (*vide ante*, p. 225), that many of the cases decided thereon are now clearly inapplicable; and as any writing containing a promise to pay any sum of money now requires to be stamped as a promissory note, it is difficult to define what instruments are to be stamped as notes, as distinguished from agreements to pay money.

The following letter, signed by the defendant, and addressed by him to the plaintiff, "G. T. M. Co.—I hereby undertake to pay you, on the first allotment of shares in the above-named Co., the sum of 105*l.* out of commission I shall have to pay E. M. in accordance with his letter to you on the other side," was held by Pollock, B., after consulting with Kelly, C. B., not to require a note stamp under the Stamp Act, 1870, s. 49, *ante*; p. 225. *Thompson v. Condry*, Sittings in London, 27th June, 1874; *Ex. rel. editoris*. The ground of this decision appears to have been that sect. 49, (1) applies only where the promise is to pay absolutely and at all events; and that (2) is limited in its application to instruments purporting to be notes, though not legally such because payable on a contingency, &c., and is not to be extended in its construction by reference to (1). See also *Hamilton v. Spottiswoode*, *supra*.

The following cases were all decided on 55 Geo. 3, c. 184, and some of them upon the special provisions of that Act with reference to agreements in the form of promissory notes, which were to be charged with agreement but not note duty, *vide ante*, pp. 225, 226. The Stamp Act, 1870, contains no similar provision, and the cases must therefore be read subject to sect. 49, (1), (*ante*, p. 225) of that act.

An instrument in this form: "Received of A. B. 100*l.* which I promise to pay on demand," is a promissory note, and requires a stamp as such. *Green v. Davies*, 4 B. & C. 235. "I O U 20*l.*, to be paid on the 22nd inst.," dated and signed, is an instrument requiring to be stamped either as a note or an agreement. *Brooks v. Elkins*, 2 M. & W. 74. But the words "value received" will not render an I O U liable to a stamp. *Gould v. Coombs*, 1 C. B. 543. "I O U 40*l.*, which I borrowed of M., and to pay 5*l.* per cent. till paid,—R. T.," is neither an agreement nor a note. *Melanotte v. Teasdale*, 13 M. & W. 216. See also *Sibree v. Tripp*, 15 M. & W. 23. "I have received the sum of 20*l.* borrowed of you, and am accountable for it with interest," was held to be an agreement and not a note. *Horne v. Redfearn*, 4 N. C. 433. So, "Borrowed of J. W. 200*l.* to account for at . . . months' notice if required," &c. *White v. North*, 3 Exch. 689. So, an instrument in the form of a receipt for money which had been advanced long before,

containing a promise to pay interest thereon, is not a promissory note. *Taylor v. Steele*, 16 M. & W. 665. But a note for money payable on demand to H., "and I have lodged with H. the counterpart leases signed, &c., as a collateral security for the sum," is a note, and not an agreement. *Fancourt v. Thorne*, 9 Q. B. 312.

Some instruments which fall within the very wide definition in sect. 49(1), have been held not chargeable thereunder, but as debentures, by reason of their appearing to fall more properly under that category. See *British India Steam Navigation Co. v. Inland Rev. Com.*, 7 Q. B. D. 165, cited *post*, p. 246.

The reservation of interest is not to be considered an addition to the sum advanced so as to require a larger stamp; thus a stamp, applicable to a note not exceeding 30*l.*, is applicable to a note for the payment of 30*l.* at 3 months after date with interest from the date. *Pruessing v. Ing*, 4 B. & A. 204. Where a joint and several note for securing the repayment of a loan was signed first by one, and some days afterwards by the other party, it was held not to require an additional stamp if the last signature was put before the money was advanced; or if the party last signing had promised to sign the note before the advance, notwithstanding it may not have been signed till afterwards. *Ex pte. White*, 3 Deac. & Chit. 366.

A memorandum in the form of a promissory note, offered in evidence for the purpose of taking a case out of the Statute of Limitations is inadmissible, unless stamped; although 9 Geo. 4, c. 14, s. 8, exempts memoranda made for that purpose from the stamp duty on agreements; *Jones v. Ryder*, 4 M. & W. 32. So it was held that a promissory note for 1,110*l.*, with 4 per cent. interest, made on a receipt stamp, was not admissible to take a debt out of the Statute of Limitations. *Parmiter v. Parmiter*, 1 J. & H. 135; 30 L. J., Ch. 508. It is to be observed that the schedule of 55 Geo. 3, c. 184, *ante*, pp. 225, 226, exempting instruments in the form of notes from the note stamp, if deemed to be agreements, was not cited in either of the two cases last cited.

Stamp on re-issued bill.] A bill payable to the drawer's order, and taken up by him, may be re-issued without a fresh stamp, unless this would have the effect of rendering any of the indorsers liable to an action. *Callow v. Lawrence*, 3 M. & S. 97; *Hubbard v. Jackson*, 4 Bing. 390. Where the bill is an accommodation bill, it would seem that it can only be re-issued with the consent of the acceptor, and therefore would require a fresh stamp. *Jewell v. Parr*, 13 C. B. 909; 22 L. J., C. P. 253. But a bill payable to the order of a third person, indorsed by him and taken up by the drawer, cannot be re-issued by him, for it would wrongfully charge the payee. *Beck v. Robley*, 1 H. Bl. 89 n.

What alteration of a bill requires a new stamp.] If a bill or note is altered in a material part, though by the consent of all parties, after it has been once issued it requires a new stamp; Bayl. on Bills, 6th ed. 118, (1); *Bowman v. Nichol*, 5 T. R. 537; *Wilson v. Justice*, Peake, Add. Ca. 96, for it is, in effect, substituting a new bill, and using a stamp already used for the old one.

An alteration in the date of a bill payable after date, *Bowman v. Nichol*; *Wilson v. Justice*, *supra*; *Outhwaite v. Luntley*, 4 Camp. 179; or in the consideration, *Knill v. Williams*, 10 East, 431; or by inserting words rendering a bill or note negotiable, which was not so originally; *Id.* 437, explaining, *Kershaw v. Cox*, 3 Esp. 246;—are material alterations, and require re-stamping. So, where the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, C. Street," to the acceptance, this alteration

was held to be material. *Cowie v. Halsall*, 4 B. & A. 197. And a similar alteration has been held to be material since the statute 1 & 2 Geo. 4, c. 78; for the right of an indorsee to sue his indorser would, according to the altered bill, be complete upon default made at the banker's and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. *Macintosh v. Haydon*, Ry. & M. 362; see *Marson v. Petit*, 1 Camp. 82, n. The Bills of Exchange Act, 1882, s. 64 (2), enumerates some material alterations, but this, by reason of sect. 97, (3, a) *infra*, has no bearing on the present question.

If the alteration be merely the correction of a mistake in furtherance of the original intent of the parties, as inserting the words "or order" in a bill intended to be negotiable, it will not require a new stamp. *Byrom v. Thompson*, 11 Ad. & E. 31. So, a mistake in the date may be corrected. *Brutt v. Picard*, Ry. & M. 37. See *Hutchins v. Scott*, 2 M. & W. 809.

At common law a stranger to a bill, by indorsing it, rendered himself liable to a subsequent indorsee, as a new drawer of the bill; but it remained the same instrument as before, and did not require a fresh stamp. *Penny v. Innes*, 1 C. M. & R. 439; *Matthews v. Blossome*, 33 L. J., Q. B. 209. This doctrine was inapplicable to promissory notes (*Gwinnell v. Herbert*, 5 Ad. & E. 436), by reason of the Stamp Act; *McCall v. Taylor*, 34 L. J., C. P. 365, 366, *per* Willes, J. By the Bills of Exchange Act, 1882, s. 56, where a person signs a bill otherwise than as drawer or acceptor he thereby incurs the liabilities "of an indorser, to a holder in due course," i.e., to a *bond fide* holder for value without notice; see sect. 29. By sect. 89 (1), the provisions of the Act are in general to extend to promissory notes; the maker being deemed to correspond with the acceptor of a bill, and the first indorsee with the drawer of an accepted bill payable to the drawer's order. As, however, sect. 97, (3, a), *ante*, p. 227, provides that nothing in the Act is to affect the Stamp Acts, it would appear that sect. 56 does not apply to promissory notes, and that *Gwinnell v. Herbert*, *supra*, is still good law.

The subject of altering bills and notes will be further treated of under the head of *Defences to actions on bills*, to which it more properly belongs: for the alteration of such an instrument, without consent, even by a stranger, affects its validity without reference to the Stamp Acts. *Master v. Miller*, 2 H. Bl. 141; 1 Smith's L. C. If made after issue or negotiation, even with consent, the bill is, as above stated, vitiated for want of a new stamp.

What is such an issuing as to render an alteration fatal.] A bill is *prima facie* considered as issued as soon as it is passed away by the drawer or accepted by the drawee, and not before. Bayley on Bills, 6th ed. 122. An exchange of acceptances is an issuing; *Cardwell v. Martin*, 9 East, 190; but a bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon. *Downes v. Richardson*, 5 B. & A. 674; *Tarleton v. Shingler*, 7 C. B. 812.

The onus of proving that the alteration was made *before* negotiation lies upon the party suing on it. *Johnson v. Marlborough*, Dk. of, 2 Stark. 313; *Denman v. Dickinson*, 5 Bing. 183. And, where the alteration is visible, it cannot be left to the jury to say, on the mere inspection without further evidence, whether it was made at or after the original making of the bill. *Knight v. Clements*, 8 Ad. & E. 215; and *Bishop v. Chambré*, M. & M. 116, there explained; *Clifford v. Parker*, 2 M. & Gr. 909. Where there was an alteration by consent in a bill drawn abroad to which no stamp was necessary, it was held to lie on the party who objected to the want of a stamp to show that it was altered in England. *Hamelin v. Bruck*, 9 Q. B. 306.

Bankrupts' Estates.—Instruments relating thereto.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 144, every deed, conveyance, &c., relating solely to freehold, &c., property, or to any mortgage, &c., on, or any estate, right or interest in any real or personal property which is part of the estate of any bankrupt, and which after the execution of such deed, &c., "either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under this Act."

Bill of Lading.

"*Bill of lading* of or for any goods, merchandise, or effects, to be exported or carried coastwise:—6*d.*"

Sect. 56. (1.) "A bill of lading is not to be stamped after the execution thereof."

Bill of Sale.

Absolute. See *Conveyance on sale*, *post*, p. 234.

By way of security. See *Mortgage, &c.*, *post*, p. 244.

Sect. 57. "A copy of a bill of sale is not to be filed in any court, unless the original, duly stamped, is produced to the proper officer."

This section however does not invalidate the registration, otherwise regular, of a bill of sale not duly stamped. *Bellamy v. Saull*, 4 B. & S. 265 ; 32 L. J., Q. B. 366.

Bond.

"*Bond* for securing the payment or repayment of money or the transfer or retransfer of stock. See *Mortgage, &c.*," *post*, p. 244.

This title includes the bonds of foreign governments, and of public companies.

"*Bond* in relation to any annuity upon the original creation and sale thereof. See *Conveyance on sale*," *post*, p. 234.

"*Bond, covenant, or instrument* of any kind whatsoever.

(1.) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security*), or of any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained:—The same *ad valorem* duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period:—For every 5*l.* and also for any fractional part of 5*l.*, of the annuity or sum periodically payable.—2*s.* 6*d.*

(2.) Being a collateral or auxiliary or additional or substituted security

for any of the above-mentioned purposes where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained :

—The same *ad valorem* duty as a bond or covenant of the same kind for such total amount.

In any other case :—For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable :—6*d.*”

Bond on obtaining letters of administration in England or Ireland, 5*s.*, from which there are certain exemptions.

“*Bond* of any kind whatsoever not specifically charged with any duty.

Where the amount limited to be recoverable does not exceed 300*l.* :—the same *ad valorem* duty as a bond for the amount limited. In any other case :—10*s.*”

“*Bonds given to sheriffs* or other persons upon the replevy of any goods or chattels, and assignments of such bonds,” are, by the general exemption (5), at the end of the schedule, free from all stamp duty. See also the general exemption (3), as to bonds relating to service in the colonies, cited *ante*, p. 222.

By 45 & 46 Vict. c. 72, s. 8, the duty on a grant or contract for the payment of a “superannuation annuity,” *i.e.* “a deferred life annuity granted or secured by contract to any person in consideration of annual premiums payable until he should attain any specified age, and so as to commence on his attaining that age,” is 6*d.* for every 5*l.*, and also for any fraction less than 5*l.* or over and above 5*l.* or a multiple of 5*l.* of the annuity.

Charter-Party.

“*Charter-party*, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of such ship or vessel :—6*d.*”

Sect. 66. “The duty upon an instrument chargeable with duty as a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.”

Sect. 67. “Where any document chargeable with duty as a charter-party, and not being duly stamped, is first executed out of the United Kingdom, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument with an adhesive stamp thereon so affixed and cancelled shall be deemed duly stamped.”

Sect. 68. “An executed instrument chargeable with duty as a charter-party, and not being duly stamped, may be stamped with an impressed stamp upon the following terms ; that is to say—(1.) Within seven days after the first execution thereof, on payment of the duty and a penalty of 4*s.* 6*d.* (2.) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of 10*l.* ; and shall not in any other case be stamped with an impressed stamp.”

Sect. 67. *supra*, enables any party to a charter-party, first signed abroad, to stamp the document in the special manner and within the time above mentioned, but sect. 68, *supra*, would seem not to prohibit the document

being stamped by the Commissioners of Inland Revenue, within two months of its arrival in this country, under the general provisions of sect. 15, (2, b), *ante*, p. 216.

A guarantee for the due performance of a charter-party does not require to be stamped as a charter-party. *Rein v. Lane*, L. R., 2 Q. B. 144.

Cheque.

See *Bill of Exchange*, *ante*, p. 224.

Cognovit.

A cognovit requires no stamp, for it is a mere acknowledgment of an account, unless matter of agreement be contained in it; as if it contains an agreement to take the debt by instalments. *Ames v. Hill*, 2 B. & P. 150; *Reardon v. Swaby*, 4 East, 188. An agreement to grant time, entered into at the same time on a separate paper, does not render an agreement stamp on the cognovit necessary. *Morley v. Hall*, 2 Dowl. 494.

Contract Note.

"Any note, memorandum, or writing, commonly called a 'contract note,' or by whatever name the same may be designated, for or relating to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards:—1*d.*"

Sect. 69. (1.) "The duty on a contract note may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the note is first executed." (3.) "No broker, agent, or other person shall have any legal claim to any charge for brokerage, commission, or agency, with reference to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards mentioned or referred to in any contract note, unless such note is duly stamped."

By 41 & 42 Vict. c. 15, s. 26, the term "contract note" in the above provisions means "exclusively an advice note, sent by a broker or agent to his principal;" and a memorandum or contract between brokers or agents shall not be chargeable with any stamp duty.

Conveyance.

Conveyance or transfer, whether on sale or otherwise, of any debenture stock or funded debt of any company or corporation:—

For every 100*l.*, and also for any fractional part of 100*l.*, of the nominal amount transferred:—2*s.* 6*d.*

Conveyance or transfer on sale:—

Of any property (except Bank of England stock or debenture stock or funded debt as aforesaid), where the amount or value of the consideration for the sale does not exceed 5*l.*—6*d.*; exceeds 5*l.* and does not exceed 10*l.*—1*s.*; 10*l.* and not 15*l.*—1*s.* 6*d.*; 15*l.* and not 20*l.*—2*s.*; 20*l.* and not 25*l.*—2*s.* 6*d.*; 25*l.* and not 50*l.*—5*s.*; 50*l.* and not 75*l.*—7*s.* 6*d.*; 75*l.* and not 100*l.*—10*s.*; and so on at the rate of 10*s.* for every 100*l.*, ascending by half-crowns till the purchase money amounts to 300*l.*, and then by crowns at each step.

Sect. 70 "The term 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction."

The sects. 71, *et seq.*, direct how the duty is to be estimated where the consideration consists of stock or a marketable security, or an annuity or rent charge.

Where several instruments.] Sect. 76. "Where there are several instruments of conveyance for completing the purchaser's title to the property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument."

Sect. 77. (1.) "In the cases below specified the principal instrument is to be ascertained in the following manner :

- (a.) Where any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument :
 - (b.) In other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in court, shall be deemed the principal instrument."
- (2.) "In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly."

"Conveyance or transfer by way of security of any property (*except such stock or debenture stock or funded debt as aforesaid*), or of any security. See *Mortgage*," *post*, p. 244.

"Conveyance or transfer of any kind not hereinbefore described, 10s."

Sect. 78. "Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10s." This proviso overrides the specific duties on transfers imposed by the schedule. See *Foley, Ltd., v. Inl. Rev. Coms.*, L. R., 3 Ex. 263. Where, however, an order appoints new trustees and also vests the trust property in them, it is liable to duty both as an appointment and also as a conveyance ; 10s. in each case. *Hadgett v. Id.*, 3 Ex. D. 46.

By the general exemptions (1), (2), at the end of the schedule, transfers of shares in the Government stocks or funds, and instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any share therein, are free from all stamp duty.

Certain conveyances relating to the estate of a bankrupt are exempt from a conveyance stamp, *vide ante*, p. 232.

An assignment of copyright by entry in the book of registry, kept at Stationers' Hall, is not liable to stamp duty; 5 & 6 Vict. c. 45, s. 13.

As to the liability to duty of a conveyance relating to crown property, *vide ante*, p. 208.

Decisions on Conveyances.] The following decisions (partly under the former Acts), seem still applicable. A mere agreement for sale, inoperative at law as a conveyance, is not chargeable under this head. *Wilmut v. Wilkinson*, 6 B. & C. 506. So, an agreement for the sale of a bed of coals, without any legal transfer of the freehold, requires no conveyance stamp. *Phillips v. Morrison*, 12 M. & W. 740. There must be a sale for money [or for stock or securities, public or private]. *Coates v. Perry*, 3 B. & B. 48. If for stock, &c., the mode of valuation is pointed out by sect. 71. It was formerly held that the sale of a chose in action was not a conveyance within the Act; but it is now settled that the Act extends to any subject of "property which belongs to a person exclusive of others, and which can be the subject of a bargain and sale to another," *per cur.* *Potter v. Inl. Rev. Coms.*, 10 Ex. 147, 156; 23 L. J., Ex. 345, 347. The *ad valorem* duty has, consequently, been held to be required in the following cases:—The assignment of the goodwill of a business. S. C.; a written sale of fixtures, *Horsfall v. Hey*, 2 Exch. 778; a deed whereby a partner in a firm of two conveyed and released all his interest in the partnership property to his copartner in consideration of the payment of the ascertained amount of the partnership property due to the former, *Christie v. Inl. Rev. Coms.*, L. R., 2 Ex. 45; *Phillips v. Id.*; *Id.* 399. But a deed purporting to be a grant by an asphaltic company of an exclusive licence to sell the asphaltic of the company in certain counties, conveys no property and does not therefore require the *ad valorem* stamp. *Limmer Asphaltic Paving Co. v. Inl. Rev. Coms.*, L. R., 7 Ex. 211.

A partition is not a sale within the Stamp Acts. *Henniker v. Henniker*, 1 E. & B. 54; 22 L. J., Q. B. 94.

If the deed of conveyance contains other matter not incident to the sale or conveyance, it requires an additional stamp adapted to the added matter; but where the transfer of railway shares contained a covenant to abide by the rules of the company, which covenant was required in all transfers, it was held that no additional stamp was necessary beyond the *ad valorem* stamp. *Wolseley v. Cox*, 2 Q. B. 321.

A certificate of the transfer and acceptance of shares in a mine, signed by both parties, may be received as an admission of the existence of a transfer without a transfer stamp. *Toll v. Lee*, 4 Exch. 230; *Walker v. Bartlett*, 18 C. B. 845.

Under sect. 17, *ante*, p. 209, conveyances of lands abroad (*e.g.*, Australia), executed in England, must be stamped. See *In re Wright*, 11 Exch. 458. S. C. *sub. nom.* *Wright v. Inl. Rev. Coms.*, 25 L. J., Ex. 49, decided on 55 Geo. 3, c. 184. See also *Stoneluke v. Babb*, 5 Burr. 2673.

Copy.

"Copy or extract (attested in any manner authenticated) of or from—(1.) An instrument chargeable with any duty. (2.) An original will, testament, or codicil. (3.) The probate or probate copy of a will or codicil. (4.) Any letters of administration or any confirmation of a testament. (5.) Any public register (except any register of births, baptisms, marriages, deaths, or burials). (6.) The books, rolls, or records of any court.

In the case of an instrument chargeable with any duty not amounting to 1s. :—the same duty as such instrument.

In any other case :—1s."

Exemption.—Copy or extract of or from any law proceedings.

By sect. 79, the copies of the instruments falling within (1), (2), (3), (4), *ante*, p. 236, may be stamped at any time within 14 days after the date of the attestation, on payment of the duty without penalty.

"Copy or Extract (*certified*) of or from any register of births, baptisms, marriages, deaths, or burials :—1d."

Exemptions.—" (1.) Copy or extract furnished by any clergyman, registrar, or other official person pursuant to and for the purposes of any Act of Parliament, or furnished to any general or superintending registrar under any general regulation. (2.) Copy or extract for which the person giving the same is not entitled to any fee or reward."

By sect. 80, this duty of 1d. "is to be paid by the person requiring the copy or extract, and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the copy or extract is signed before he delivers the same out of his hands, custody, or power."

An examined copy of a deed, produced by a witness at a trial to prove the original, which the opposite party refuses to produce requires no stamp, for "copy" means an authenticated copy receivable in evidence in the first instance, and the unstamped copy is used merely to refresh the witness's memory. *Braythwaite v. Hitchcock*, 10 M. & W. 494. So, a copy signed by the party against whom it is offered as secondary evidence is admissible without a stamp. *Smith v. Maguire*, 1 F. & F. 199. See also *Stowe v. Querner*, L. R., 5 Ex. 155, cited *ante*, p. 10.

As to stamps on copy of court roll, *vide infra*.

Copyhold and Customary Estates—Instruments relating thereto.

"Upon a sale thereof. See *Conveyance on Sale*," *ante*, p. 234.

"Upon a mortgage thereof. See *Mortgage, &c.*," *post*, p. 424.

"Upon a demise thereof. See *Lease*," *post*, p. 240.

"Upon any other occasion. Surrender or grant made out of court, or the memorandum thereof, and copy of court roll of any surrender or grant made in court :—10s."

Sect. 81. "(1.) The copy of court roll of a surrender or grant made out of court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor on the face of such copy shall be sufficient evidence.

"(2.) The entry upon the court rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll of the surrender or grant, if made in court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence."

Sect. 82. "No instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof several fines or fees are due to the lord or steward of the manor."

Sect. 85 requires the steward within four months of surrender or grant made in court, to deliver stamped copy of court roll, and by sect. 86, he may refuse to accept surrender, or make grant in court before payment of his fees and of the stamp duty.

In cases falling under the present act, sect. 81 (*supra*) renders the deci-

sions cited below on the former acts inapplicable, but it still seems that a mere examined copy, proved in evidence, requires no stamp; for the "copy" mentioned in the schedule means the copy delivered by the steward *Doe d. Burrowes v. Freeman*, 12 M. & W. 844. Although if it were shown that the entry on the rolls was unstamped, the evidence would become inadmissible by reason of the above section.

Under the Stamp Act, 55 Geo. 3, c. 184, it was not necessary to stamp court rolls; but surrenders and admittances *out* of court, and copies of surrenders and admittances made *in* court, must have been duly stamped, except in the case of a surrender to the use of a will; the schedule of 13 & 14 Vict. c. 97, regulated the duty on admittances since 10 Oct. 1850. A surrender *out* of court may be proved by an unstamped copy; *Doe d. Cawthorn v. Mee*, 4 B. & Ad. 617. As between surrenderor and surrenderee, the court rolls, containing a presentment of a surrender out of court, appear to be primary evidence of the surrender, without producing the original stamped surrender. *Doe d. Garrod v. Olley*, 12 Ad. & E. 481. But surrenders and grants made on and after the 1st January, 1871, must be proved as provided by the Stamp Act, 1870, s. 81, *ante*, p. 237.

Cost-Book Mines, Transfer of Shares in.

See *Transfer*, *post*, p. 255.

Counterpart.

See *Duplicate*, *post*, p. 240.

Covenant.

"*Covenant* for securing the payment or repayment of money, or the transfer or re-transfer of stock. See *Mortgage, &c.*," *post*, p. 244.

"*Covenant* in relation to any annuity upon the original creation and sale thereof. See *Conveyance on sale*," *ante*, p. 234.

"*Covenant* in relation to any annuity (except upon the original creation and sale thereof) or to other periodical payments. See *Bond, Covenant, &c.*," *ante*, pp. 232, 233.

"*Covenant*. Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid.

Where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed 10s.:—a duty equal to the amount of such *ad valorem* duty. In any other case:—10s."

Declaration of Use or Trust.

"*Declaration* of any use or trust of or concerning any property by any writing, not being a deed or will or an instrument chargeable with *ad valorem* duty as a settlement:—10s."

Declaration, Statutory.

See *Affidavit*, ante, p. 218.

Deed.

Deed of any kind whatsoever, not described in the schedule to the Stamp Act, 1870 :—10s.

By sect. 4, any instrument specifically charged with a duty of 35s. by any Act not relating to stamp duties is now to bear a 10s. stamp.

An agreement under seal for a lease for a term exceeding 35 years requires a 10s. stamp. *Clayton v. Burtenshaw*, 5 B. & C. 41. If not exceeding 35 years it bears a lease stamp under sect. 96 (1), *post*, p. 241. *Semb.* a licence to use a patent, though under seal, does not require a stamp. *Chanter v. Johnson*, 14 M. & W. 408.

Delivery Order and Warrant for Goods.

" *Delivery order* :—1d."

" *Warrant for goods* :—3d."

Exemptions.] "(1.) Any document or writing given by any inland carrier acknowledging the receipt of goods conveyed by such carrier. (2.) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise."

Delivery order.] Sect. 87. "The term 'delivery order' means any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of 40s. or upwards lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such document or writing being signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein."

Warrant for goods.] Sect. 88. "The term 'warrant for goods' means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise, lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of such goods, wares, or merchandise."

Sect. 89. "The duty upon a delivery order or warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued."

Sect. 90. "The duty upon a delivery order is, in the absence of any special stipulation, to be paid by the person to whom the order is given, and any person from whom a delivery order chargeable with duty is required may refuse to give it, unless or until the amount of the duty is paid to him."

Sect. 91. "(1.) Every document or writing in the nature of a delivery order is to be deemed to have been given upon a sale of, or transfer of the property in, goods, wares, or merchandise of the value of 40s. or upwards,

unless the contrary is expressly stated therein." "(2.) But no delivery order is, by reason of the same being unstamped, to be deemed invalid in the hands of the person having the custody of or delivering out, the goods, wares, or merchandise therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto."

Duplicate.

"*Duplicate or Counterpart* of any instrument chargeable with any duty.

"Where such duty does not amount to 5s. :—the same duty as the original instrument. In any other case :—5s."

Sect. 93. "The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart."

Where two parts of a written agreement are executed at the same time, the one stamped and the other unstamped, the unstamped part, if properly verified, is admissible as secondary evidence of the contents of the stamped part; for, in point of law, it is only used as a memorandum to refresh the mind of the witness. *Waller v. Horsfall*, 1 Camp. 501; *Munn v. Godbold*, 3 Bing. 292; and see *Braythwayte v. Hitchcock*, 10 M. & W. 494, cited *ante*, p. 237. Where, however, both the parts are executed by both parties, the unstamped part is a duplicate original (*vide ante*, p. 3), and being primary evidence, excludes secondary evidence, but could not itself be put in evidence without being stamped as a duplicate.

Foreign Instrument.

Vide ante, p. 214.

Lease.

Lease :—

"(1) For any definite term less than a year :—

(a.) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum :—1*d.*

(b.) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.* :—2*s.* 6*d.*

(c.) Of any lands, tenements, or heritable subjects except, or otherwise than as aforesaid :—the same duty as a lease for a year at the rent reserved for the definite term.

(2.) For any other definite term or for any indefinite term; of any lands, tenements, or heritable subjects :—

Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money stock or security: in respect of such consideration :—the same duty as a conveyance on a sale for the same consideration.

Where the consideration or any part of the consideration is any rent: in respect of such consideration: if the rent, whether reserved as a yearly rent or otherwise is at a rate or average rate :

	If the term is definite, and does not exceed 35 years, or is indefinite.	If the term being definite exceeds 35 years, but does not exceed 100 years.	If the term being definite exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding 5 <i>l.</i> per annum	0 0 6	0 3 0	0 6 0
Exceeding—			
5 <i>l.</i> and not exceeding 10 <i>l.</i>	0 1 0	0 6 0	0 12 0
10 <i>l.</i> " " 15 <i>l.</i>	0 1 6	0 9 0	0 18 0
15 <i>l.</i> " " 20 <i>l.</i>	0 2 0	0 12 0	1 4 0
20 <i>l.</i> " " 25 <i>l.</i>	0 2 6	0 15 0	1 10 0
25 <i>l.</i> " " 50 <i>l.</i>	0 5 0	1 10 0	3 0 0
50 <i>l.</i> " " 75 <i>l.</i>	0 7 6	2 5 0	4 10 0
75 <i>l.</i> " " 100 <i>l.</i>	0 10 0	3 0 0	6 0 0
100 <i>l.</i>			
For every full sum of 50 <i>l.</i> and also for any fractional part of 50 <i>l.</i> thereof	0 5 0	1 10 0	3 0 0

(3.) Of any other kind whatsoever not hereinbefore described :—10*s.*"

It was held under the earlier acts that where the lease was for 45 years at a substantial rent for the first 22 years, at a peppercorn during the remaining 22, the lowest scale applied; *Pearson v. Inl. Rev. Coms.*, L. R., 3 Ex. 242; but under the present act it seems that, for the calculation of the duty, the average of the rent has to be taken for the whole term.

By 39 & 40 Vict. c. 16, s. 11, an instrument whereby the rent reserved by a duly stamped lease is increased, is chargeable as a lease made in consideration only of the additional rent thereby made payable.

Agreement for Lease.] Sect. 96. "(1.) An agreement for a lease or tack or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding 35 years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement. (2.) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of 6*d.* only."

Sect. 97 relates to the calculation of the duty where the consideration consists of produce or goods.

Sect. 98. "(1.) A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject-matter.

"(2.) No lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such further consideration.

"(3.) No lease for a life or lives not exceeding three, or for a term of

years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding 21 years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 35s."

Adhesive stamp.] Sect. 99. "The duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of :—(1.) Any dwelling-house or tenement or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum. (2.) Any furnished dwelling-house or apartments; or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed."

Decisions on lease stamps.] The Stamp Act makes no distinction between leases under seal, or in writing, not sealed. *Goodtitle d. Eastwick v. Way*, 1 T. R. 735.

Where a lease contained a demise of two farms with two different *habendums* and separate reservations of rents and covenants, some applying to one farm and some to another, one *ad valorem* stamp for the amount of both rents was held sufficient. *Blount v. Pearman*, 1 N. C. 408; *Parry v. Deare*, 5 Ad. & E. 551.

An instrument purporting to grant a freehold lease; *Stone v. Rogers*, 2 M. & W. 443, or a term of years exceeding three; *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 127; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Tidey v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Stranks v. St. John*, L. R., 2 C. P. 376; but which was ineffectual for want of a seal, could only operate as an agreement, and therefore did not require a lease stamp, but it required an agreement stamp, and when the term does not exceed 35 years the stamp is now the same as on a lease (see sect. 96, *ante*, p. 241). A mere attornment does not require a stamp. *Doe d. Linsey v. Edwards*, 5 Ad. & E. 95; *Accord. Barry v. Goodman*, 2 M. & W. 768. The stamp formerly required was regulated by the consideration (whether fine or rent) *expressed* to be paid, and not by that which was actually paid; *Doe d. Kettle v. Lewis*, 10 B. & C. 673; but under the present act this seems to be otherwise. A lease containing an agreement to take the fixtures cannot be given in evidence without a lease stamp, though only used in an action for the value of the fixtures, and though it has an agreement stamp. *Corder v. Drakeford*, 3 Taunt. 382. A lease containing a distinct agreement, not ancillary to the lease, requires stamps of both kinds. *Lovelock v. Franklyn*, 8 Q. B. 371; *Coster v. Cowling*, 7 Bing. 456. But where there is a lease with an agreement contained in it, giving the lessee the option of purchasing the premises within a certain time, only a lease stamp is necessary. *Worthington v. Warrington*, 5 C. B. 536. Where there was a written lease to A., and an agreement at the end of it by a third person, B., to guarantee to the lessor the payment of moneys to become due from A. to him under the provisions of the lease, a lease stamp and also an agreement stamp were held necessary, B. not being a party to the rest of the instrument. *Wharton v. Walton*, 7 Q. B. 474.

A lease made by the landlord to a vendee of the party, to whom he had agreed to grant it, must recite and be charged upon the consideration paid on the sale to the vendee. *Att.-Gen. v. Brown*, 3 Exch. 662. Under the Stamp Act, 1870, it is liable to double duty; i.e., the duty as on a lease to the vendor, and the duty as on a sale by him to the vendee.

As to effect of reference by lease to a prior one, see *Schedule, post*, p. 253.

Legacy Receipt.

See *Receipt*, *post*, p. 251.

Letters of Administration.

See *Probate*, *post*, p. 250.

Letter of Allotment, Scrip Certificate, &c.

“*Letter of allotment* or *letter of renunciation*, or any other document having the effect of a letter of allotment:—(1.) Of any share of any company or proposed company; (2.) In respect of any loan raised, or proposed to be raised by any company or proposed company, or by any municipal body or corporation; (3.) Issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company:—*ld.*

“And *Scrip certificate*, *scrip*, or other document:—(1.) Entitling any person to become the proprietor of any share of any company or proposed company; (2.) Issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company; (3.) Denoting or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation; (4.) Issued or delivered in the United Kingdom, and denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by or on behalf of, any foreign or colonial state, government, municipal body, corporation or company:—*ld.*”

Letter of Attorney.

“*Letter*, or *power of attorney*, or *commission*, *factory*, *mandate*, or other instrument in the nature thereof:

“(1.) For the sole purpose of appointing or authorising” a proxy at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more (34 & 35 Vict. c. 4, s. 4):—*ld.*

“(3.) For the receipt of the dividends or interest of any stock:

“Where made for the receipt of one payment only:—*ls.*

“In any other case:—*5s.*

“(4.) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money not exceeding 20*l.*, or any periodical payments not exceeding the annual sum of 10*l.* (not being hereinbefore charged):—*5s.*

“(5.) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds:

“Where the value of such stocks or funds does not exceed 20*l.*:—*5s.*

“In any other case:—*10s.*

“(6.) Of any kind whatsoever not hereinbefore described:—*10s.*”

Exemptions.] “(1.) Letter or power of attorney for the receipt of dividends of any definite and certain share of the Government or Parliamentary stocks or funds producing a yearly dividend of less than 3*l*. (2.) Letter or power of attorney or proxy filed in the Court of Probate in England or Ireland, or in any ecclesiastical court.”

Sect. 104. “A writing under hand only containing an order, request or direction from the owner or proprietor of any stock to any company or to any officer of any company, or to any banker, to pay the dividends or interest arising from such stock to any person therein named, is not chargeable with duty as a letter or power of attorney.”

Sect. 103. “A letter or power of attorney for the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds, duly stamped for that purpose, is not to be charged with any further duty by reason of containing an authority for the receipt of the dividends on the same stocks or funds.”

Voting paper, adhesive stamp, &c.] Sect. 102. “(1.) Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of 1*d*., is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, or any adjournment thereof. (2.) The said duty of 1*d*. may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is executed.”

“(4.) Every vote given or tendered under the authority or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall be absolutely null and void. (5.) And no such letter or power of attorney or voting paper shall on any pretence whatever be stamped after the execution thereof by any person.”

Voting papers used under 7 Wm. 4 and 1 Vict. c. 78, ss. 13, 14, at the meeting of the town council of a municipal borough for the election of an alderman do not require a stamp under this act. *R. v. Strachan*, L. R. 7 Q. B. 463.

Memorial.

“*Memorial* to be registered pursuant to any act of parliament made or to be made for the public registering of deeds and conveyances.

“Where the instrument registered is chargeable with any duty not amounting to 2*s*. 6*d*. :—The same duty as the registered instrument.

“In any other case :—2*s*. 6*d*.”

Mortgage.

“*Mortgage, bond, debenture, covenant, warrant of attorney* to confess and enter up judgment, and *foreign security* of any kind.

“(1.) Being the only or principal or primary security for the payment or repayment of money not exceeding* 25*l*.—8*d*. ; exceeding 25*l*. and not exceeding 50*l*.—1*s*. 3*d*. ; 50*l*. and not 100*l*.—2*s*. 6*d*. ; 100*l*. and not 150*l*.—3*s*. 9*d*. ; 150*l*. and not 200*l*.—5*s*. ; 200*l*. and not 250*l*.—6*s*. 3*d*. ; 250*l*. and not 300*l*.—7*s*. 6*d*. ; exceeding 300*l*.—for every 100*l*., and also for any fractional part of 100*l*. of such amount, 2*s*. 6*d*.

* By 46 & 47 Vict. c. 55, s. 15, where the amount secured does not exceed 10*l*., the duty is 3*d*., except in the case of a warrant of attorney.

"(2.) Being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped—for every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured :—6*d.*

"(3.) *Transfer, assignment, disposition, or assignation* of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment :—for every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned, or disposed :—6*d.* ; and also where any further money is added to the money already secured :—the same duty as a principal security for such further money.

"(4.) *Re-conveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation* of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured—for every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured :—6*d.*"

Mortgage of any stock or marketable security is, by 34 & 35 Vict. c. 4, s. 5, charged as follows :—"For every 5000*l.* and also for any fractional part of 5000*l.* of the amount secured :—10*s.*

"And no release or discharge of any such mortgage shall be chargeable with any *ad valorem* duty."

Definition of mortgage.] Sect. 105. "The term 'mortgage,' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be ; and includes conditional surrender by way of mortgage, further charge, &c., of or affecting any lands, estate, or property, real or personal whatsoever :

"Any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where such conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number :

"Also any defeasance, declaration, or other deed or writing for defeating or making redeemable or explaining or qualifying any conveyance, or disposition, of any lands, estate, or property whatsoever, apparently absolute but intended only as a security.

"Also any agreement, contract, or bond accompanied with a deposit of title-deeds for making a mortgage, wadset, or any such other security or conveyance as aforesaid of any lands, estate, or property comprised in such title-deeds, or for pledging or charging the same as a security."

By sect. 107. (1.) Where the security is for payment of future advances, or a sum to become due on an account current with or without past advance, then if the ultimate amount secured is limited, the duty is on a security for the maximum amount. (2.) Where there is no such limit, the security is to be available only for the amount covered by the stamp impressed.

Sect. 109. "No transfer of a duly stamped security and no security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is to be charged with any duty by reason of containing any further or additional security for the

money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security." See *Robinson v. Macdonnell*, 5 M. & S. 228.

Sect. 110. "(1.) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court." (2.) Where such lands are mortgaged with other lands, the *ad valorem* duty shall be on the instrument relating to the other property.

Definition of foreign security.] By 34 & 35 Vict. c. 4, s. 2, "the term 'foreign security' means and includes every security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company, bearing date or signed after the 3rd June, 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note),— (1.) Which is made or issued in the United Kingdom: or (2.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom." A security is "issued" when the company part with the possession and control of it. *Grenfell v. Int. Rev. Coms.*, 1 Ex. D. 242.

Decisions on mortgage stamps.] Where title deeds are deposited by way of equitable mortgage, a mere memorandum stating the object of such deposit requires no stamp; *Meek v. Bayliss*, 31 L. J., Ch. 448; nor an instrument reciting a *past* deposit, but not made for the purpose of creating a charge. *Pyle v. Partridge*, 15 M. & W. 20; see also *Fancourt v. Thorne*, 9 Q. B. 312. A pledge of goods, as a bill of lading, is not within it, *Harris v. Birch*, 9 M. & W. 591. So, a memorandum of the deposit of goods with a contingent power of sale does not require a mortgage stamp. *Re Attenborough*, 11 Exch. 461; S. C. *sub nom.*, *Attenborough v. Int. Rev. Coms.*, 25 L. J., Ex. 22. Where a deed is in substance a transfer of an existing mortgage although in point of law the old debt and equity of redemption are extinguished, it need be stamped as a transfer only. *Wale v. Int. Rev. Coms.*, 4 Ex. D. 270. An instrument issued by a company, not under seal, purporting on its face to be a "debenture," and containing an engagement to pay the amount thereof to P. W. A., or order, and also to pay interest to the holder on presentation of the coupons attached, is chargeable as a debenture and not as a promissory note. *British India Steam Navigation Co. v. Int. Rev. Coms.*, 7 Q. B. D. 165.

Exemptions.] By the general exemption (2) at the end of the schedule (*ante*, p. 235), instruments for the mortgage of a ship or vessel, or any share therein, are free from all stamp duty.

By 35 & 36 Vict. c. 93, s. 24, a special contract pawn-ticket, or its duplicate, in respect of a loan by a pawnbroker, above 40s. and not exceeding 10l. requires no stamp.

Mortgages given to the trustees of building societies, established under 6 & 7 Wm. 4, c. 32, were by that act exempted from stamp duty. But by the Stamp Act, 1870, s. 112, this exemption was limited to mortgages made by members to secure sums not exceeding 500l., and has been wholly repealed by the Building Societies Act, 1874 (37 & 38 Vict. c. 42, ss. 7, 41). The Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15, (2, *d.*), does

not exempt from duties, securities on which the funds of a friendly society are invested. See *Re R. Liver Friendly Society*, L. R., 5 Ex. 78. A conveyance by debtor, to trustees in trust to sell and with the proceeds to discharge, first, debts due to the trustees and then debts due to other creditors, with a resulting trust for the original debtors, is within the exception in the Stamp Act, 1870, s. 105, *ante*, p. 245. *Coates v. Perry*, 3 B. & B. 48.

A transfer of a mortgage to effect an appointment of new trustees is not, by sect. 78 (*ante*, p. 235), to bear a higher stamp than 10s. See *Foley, Ltd., v. In. Rev. Coms.*, L. R., 3 Ex. 263.

Policy of Insurance.

Life insurance.] “*Policy of insurance.* (1.) Upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives (except for the payment of money upon the death of any person only from accident or violence or otherwise than from a natural cause)—Where the sum insured does not exceed 10*l.*—1*d.* : exceeds 10*l.* but does not exceed 25*l.*—3*d.* ; exceeds 25*l.* but does not exceed 500*l.*—for every full sum of 50*l.*, and also for any fractional part of 50*l.*, of the amount insured, 6*d.* ; exceeds 500*l.* but does not exceed 1000*l.*—for every full sum of 100*l.*, and also for any fractional part of 100*l.*, of the amount insured, 1*s.* ; exceeds 1000*l.*—for every full sum of 1000*l.*, and also for any fractional part of 1000*l.*, as the amount insured, 10*s.*”

Fire and accident insurance.] “(2.) For any payment agreed to be made upon the death of any person, only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury, or by way of indemnity against loss or damage of or to any property :—1*d.*”

Definitions.] Sect. 117. (1.) The term “insurance” includes assurance and the term “policy” includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced ; and, except as hereinafter mentioned (*post*, p. 249), this act does not apply to policies of sea insurance.

Adhesive Stamps.] “Sect. 119. (1.) The duties imposed by this act upon policies of insurance may be denoted by adhesive stamps, or partly by adhesive and partly by impressed stamps. (2.) When the whole or any part of the duty upon a policy of insurance is denoted by an adhesive stamp, such adhesive stamp is to be cancelled by the person by whom the policy is first executed.”

Sea insurance.] The duties payable in respect to sea insurances are still regulated by stat. 30 & 31 Vict. c. 23, *vide* Stamp Act, 1870, s. 117 (1), *supra*.

By the Schedule (B) of that act the following stamp duties are payable :—

For every policy for or upon any voyage—in respect of every 100*l.*, and fractional part of 100*l.*—3*d.*

For every policy for time—in respect of every 100*l.*, and fractional part of 100*l.*—where the insurance shall be made for any time not exceeding 6 months—3*d.* ; for 6 months and not exceeding 12—6*d.*

But if the separate and distinct interests of two or more persons shall be insured by one policy for a voyage or for time, then the duty of 3*d.*, or the duty of 6*d.*, as the case may require, shall be charged thereon in respect of every 100*l.*, and fractional part of 100*l.*, thereby insured upon any separate

or distinct interest. Now, by 39 & 40 Vict. c. 6, s. 1, where the policy is stamped in respect of the aggregate of such interests, but not with respect of each of them, it may be stamped with additional stamps within one month after the last risk has been declared.

By 30 & 31 Vict. c. 23, s. 11, where the insurance is made for a voyage, and also for time, or to extend to or cover any time beyond 24 hours after the ship shall have arrived at her destination and there be moored at anchor, the policy is made chargeable with both voyage and time policy duty.

By sect. 8, "no policy shall be made for any time exceeding 12 months and every policy which shall be made for any time exceeding 12 months, shall be null and void to all intents and purposes."

By sect. 9, "no policy shall be pleaded or given in evidence in any court or admitted in any court to be good or available in law or in equity, unless duly stamped;" and no policy may be stamped after it is signed, or underwritten by any person; except in the case—

(1.) Of mutual insurances not underwritten to an extent beyond that which the stamps already impressed warrant.

(2.) Policies executed abroad chargeable with duty, *vide post*, p. 249.

Now, by 39 & 40 Vict. c. 6, s. 2 (*ante*, p. 217), a sea policy may be stamped at the trial on payment of the unpaid duty and of penalties.

By 30 & 31 Vict. c. 23, s. 4, "sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or on the machinery, tackle, or furniture thereof, or upon any goods, &c., on board, or upon the freight, or any other interest which may be lawfully insured in or relating to any ship or vessel; and "policy" means any instrument whereby a contract or agreement for any sea insurance is made.

By sect. 12, where any carrier by sea or other person, in consideration of any sum for additional freight or otherwise, agrees to take any risk attending goods, &c., while on board any ship or vessel, or to indemnify the owner of the goods from any risk, loss, or damage, the agreement is a contract for sea insurance.

By sect. 16, no broker, &c., may charge his employer for brokerage or for any moneys expended as premium for any such insurance, unless duly stamped; and all sums paid by the employer on any such account to any broker, &c., making any such insurance contrary to this act are deemed to be paid without consideration, and remain the property of such employer. See *Roderick v. Hovil*, 3 Camp. 102.

Form of Policy.] By 30 & 31 Vict. c. 23, s. 7, "no contract or agreement for sea insurance (other than such insurance as is referred to in the" 25 & 26 Vict. c. 63, s. 55, *post*, p. 249), "shall be valid unless the same is expressed in a policy, and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

This section, read with the definition clause, sect. 4, *supra*, now replaces 35 Geo. 3, c. 63, s. 2, which was similar in its terms. It was sufficient if the name of the underwriting firm was expressed in the policy; *Reid v. Allan*, 4 Exch. 326; *Dowdall v. Allan*, 19 L. J., Q. B. 41. And where each of the parties in a secret partnership underwrites in his own name, on account of the partnership, this is a compliance with the act; *Brett v. Beckwith*, 26 L. J., Ch. 130. But a policy issued by the A. A. Association for mutual insurance, signed by the managers "*per proc.* of the several members of the A. A. association for insuring each other's ships," the members liable being a fluctuating body, is void, for the policy does not state the names of the underwriters. *Ex parte Hargrove*, L. R., 10 Ch. 542. Where

an agent has insured goods in his own name on behalf of his principal, the latter is entitled to sue on the policy, although it does not show that the agent was insuring as such. *De Vignier v. Swanson*, 1 B. & P. 346, n.; followed in *Browning v. Provincial Insurance Co. of Canada*, L. R., 5 P. C. 263. But, it must be proved that the policy was effected on behalf of the plaintiff. *Watson v. Swan*, 11 C. B., N. S., 756; 31 L. J., C. P. 210. The statute applies to agreements of mutual insurance; *Smith's case*, L. R., 4 Ch. 611; *Ex parte Hargrove*, ante, p. 248. As to what is sufficient description of the risk, see *Edwards v. Aberayron Mutual Ship. Insur. Soc.*, 1 Q. B. D. 563. A defence arising from non-compliance with this section must now be pleaded specially. Rules, 1883, O. xix., r. 20, post, p. 284. The 25 & 26 Vict. c. 63, s. 55, has reference to the following events, occurring without the actual fault or privity of the owners of the ship, viz.:—(1) loss of life or personal injury caused to any person carried in any ship; (2) damage or loss caused to any goods, merchandise, or other things whatsoever on board any ship; (3) loss of life or personal injury, by reason of the improper navigation of any ship, caused to any person carried in any other ship or boat; (4) loss or damage, by reason of the improper navigation of any ship, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat.

Effect of slip.] An insurance slip, when initialed by an insurance company or underwriters, is, in the ordinary course of business, treated as a contract to insure and to issue a policy in accordance with the slip; 30 & 31 Vict. c. 23, ss. 4, 7 (ante, p. 248), however, prevent its being used as evidence of such a contract, and the contract is therefore only binding in honour; *Fisher v. Liverpool Marine Insurance Co.*, L. R., 8 Q. B. 469; L. R., 9 Q. B. 418, Ex. Ch.; but the slip is admissible in evidence for any other purpose, e.g., to show the intention of the parties as to what risk was undertaken by the underwriters; *Ionides v. Pacific, &c., Insurance Co.*, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517, Ex. Ch.; *Lishman v. N. Maritime Insur. Co.*, L. R., 8 C. P. 216; L. R., 10 C. P. 179, Ex. Ch. See also *Cory v. Patton*, L. R., 7 Q. B. 304; and L. R., 9 Q. B. 577. Apart from the initialing of the slip there is no contract by an insurance company to forward the copy slip and to issue the policy; *Fisher v. Liverpool Marine Insur. Co.*, supra.

Executed abroad.] By the Stamp Act, 1870, s. 117, "(2.) A policy of sea insurance made or executed out of, but being in any manner enforceable within, the United Kingdom, is to be charged with duty under the stat. 30 Vict. c. 23, and may be stamped at any time within two months after it has been first received in the United Kingdom on payment of the duty only."

Alterations.] By 30 & 31 Vict. c. 23, s. 10, nothing in that "act shall extend or be construed to extend to prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy after the same shall have been underwritten; provided that such alteration be made before notice of the determination of the risk originally insured, and that it shall not prolong the time covered by the insurance thereby made beyond the period of six months, in the case of a policy made for a less period than six months, or beyond the period allowed by this act in the case of a policy made for a greater period than six months, and that the articles insured shall remain the property of the same person or persons; and that no additional or further sum shall be insured by reason or means of such alteration."

The following cases were decided under 35 Geo. 3, c. 63, s. 13, now repealed, the provisions of which much resembled the above section. A mere exten-

sion of the time of sailing is within the above clause, and the alteration requires no new stamp. *Kensington v. Inglis*, 8 East, 273; *Brocklebank v. Sugrue*, 1 B. & Ad. 81. So a memorandum waiving the warranty of seaworthiness. *Weir v. Aberdeen*, 2 B. & A. 325. But where a policy on "a ship and outfit" was altered by inserting "ship and goods," it was held to require a new stamp, and to be void against the underwriters, though they had assented to the alteration. *Hill v. Patten*, 8 East, 373.

Power of Attorney.

See *Letter of attorney*, ante, p. 243.

Probate and Letters of Administration.

These duties were not affected by the Stamp Act, 1870. They were formerly payable on the instruments themselves but under the Customs and Inland Revenue Act, 1881, 44 & 45 Vict. c. 12, Part III., by which they are now regulated, they are, by sect. 27, payable instead on the affidavit received from the person applying for probate, &c.; and by sect. 30 the probate, &c., bears a certificate showing that the affidavit has been delivered duly stamped and stating the gross value of the estate and effects as shown by the account. And by sect. 26, the probate, &c., having thereon such a certificate shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate." Under sect. 27 the scale of duties is as follows:—

Where the estate and effects for which probate or letters of administration are granted, *exclusive* of debts and funeral expenses, are above the value of 100*l.* and not exceeding 500*l.*—at the rate of 2*l.* per cent.; above 500*l.* and not exceeding 1000*l.*, 2*l.* 10*s.* per cent.; above 1000*l.*, 3*l.* per cent. By sect. 33, where the gross amount of the estate exceeds 100*l.* but not 300*l.*, the duty is 1*l.* 10*s.*

Sects. 32, 35, contain provisions for increasing the amount of duty when the estate is found to be of greater value than that under which it was sworn.

By sect. 26 the provisions of former acts relating to probates, &c. (sec. 55, Geo. III. c. 184, Part III.), so far as they are consistent with the provisions of this Act, apply to the duties on affidavits imposed by this Act.

Probate is admissible in evidence though not stamped within 6 months. *Lacy v. Rhys*, 4 B. & S. 873, Ex. Ch. The value must be calculated at the time the probate was granted and not at the time of testator's decease. *Doe d. Richards v. Evans*, 10 Q. B. 476. *Accord. Partington v. Att.-Gen.*, L. R., 4 H. L. 100. The insufficiency of the stamp to cover the amount sued for is a fatal objection. *Doe d. Richards v. Evans*, *supra*; *Hunt v. Stevens*, 3 Taunt. 113; *Carr v. Roberts*, 2 B. & Ad. 905; but see *Whyte v. Rose*, 3 Q. B. 493, 499, *per* Ld. Abinger. The objection must at any rate be taken as early as possible at the hearing of the cause, and is too late after the document has been received in evidence. *Robinson v. Vernon, Ltd.*, 7 C. B., N. S. 235; 29 L. J., C. P. 310, cited *ante*, p. 217. The duty attaches on all goods within the jurisdiction, whatever was the domicile of the deceased. *Partington v. Att.-Gen.*, *supra*; *Fernandes' Executors' case*, L. R., 5 Ch. 314. As to what goods are within the jurisdiction, see *Att.-Gen. v. Pratt*, L. R., 9 Ex. 140.

Progressive Duty.

Under the Stamp Act, 1870, this duty is no longer chargeable.

Promissory Note.

See *Bank note, &c., ante*, p. 224.

Protest and Notarial Act.

“*Protest of any bill of exchange or promissory note :—*

“Where the duty on the bill or note does not exceed 1s. :—the same duty as the bill or note. In any other case :—1s.

“*Notarial act of any kind whatsoever (except a protest of a bill of exchange or promissory note) :—1s.*”

Adhesive stamp.] Sect. 116. “The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be cancelled by the notary.”

Proxy.

See *Letter of attorney, ante*, p. 243.

Receipt.

“*Receipt given for, or upon the payment of, money amounting to 2l. or upwards :—1d.*”

Exemptions.] “(1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for. (2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment. (3.) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of Her Majesty.”

(7.) Receipt given for the consideration money for the purchase of any share in any of the Government stocks or funds, or in Indian stocks, or bank stock, or for any dividend paid on any share of the said stocks or funds respectively. “(8.) Receipt given for any principal money or interest due on an exchequer bill. (9.) Receipt written upon a bill of exchange or promissory note duly stamped.” (10.) Receipt given upon any bill or note of the Bank of England or of Ireland. (11.) “Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest or annuity thereby secured or therein mentioned.”

Other exemptions relate to payments made by various departments of the Government. These exemptions are extended by 45 & 46 Vict. c. 72, s. 9.

Definition of receipt.] Sect. 120. “The term ‘receipt’ means and includes any note, memorandum, or writing whatsoever whereby any money amounting to 2l. or upwards, or any bill of exchange or promissory note for money amounting to 2l. or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand or any part of a debt or demand, of the amount of 2l. or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.”

Adhesive stamp.] Sect. 121. "The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands."

Penalty for stamping.] Sect. 122. "A receipt given without being stamped may be stamped with an impressed stamp upon the terms following, that is to say :—(1) Within 14 days after it has been given, on payment of the duty and a penalty of 5*l.* ; (2) After 14 days, but within 1 month, after it has been given, on payment of the duty and a penalty of 10*l.* ; and shall not in any other case be stamped with an impressed stamp."

The provisions of 43 Geo. 3, c. 126, s. 5, which enabled a debtor paying money and requiring a receipt, to provide a stamped receipt for the creditor to sign, are repealed by 33 & 34 Vict. c. 99, and there is no analogous provision in the Stamp Act, 1870.

Legacy receipt.] By 36 Geo. 3, c. 52, s. 27, no evidence may be given of payment of the legacy without producing the stamped receipt, or giving proof of the actual payment of the duty ; but a copy of the entry in the books of the Commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof. This section has a special provision with regard to the duty payable on annuities bequeathed.

It was held that the copy here referred to was an examined copy ; and that a copy made and signed by the Comptroller of Stamps was not admissible in evidence under the above section ; *Harrison v. Borwell*, 10 Sim. 380 ; but such a copy would now be evidence under 14 & 15 Vict. c. 99, s. 14, *ante*, p. 96.

By 36 Geo. 3, c. 52, s. 29 ; 48 Geo. 3, c. 149, s. 44 ; and 55 Geo. 3, c. 184, Sched., Part III., receipts for legacies may be stamped with the amount of legacy duty payable thereon, without penalty, within 21 days after they are signed ; they may be stamped afterwards on payment of the duty, and a penalty of 10*l.* per cent. on the duty.

Decisions on receipts.] An acknowledgment of having received acceptances, with an undertaking to provide for them, has been held to require a receipt stamp. *Scholey v. Walsby*, Peake, 24. So a bill of parcels, subscribed "settled by two bills, one at 9, the other at 12 months," was held by Ld. Ellenborough to be an acquittance which could not be evidence unless stamped. *Smith v. Kelly*, Peake, 25, n. ; S. C. (ill-reported), 4 Esp. 249. So the word "settled" under a bill. *Spawforth v. Alexander*, 2 Esp. 621. "Memorandum. That any demand we have against G. W. for ironwork is this day discharged in consideration of services rendered by him to us : our account shall be delivered with a stamped receipt,"—requires a stamp. *Livingstone v. Whiting*, 15 Q. B. 722. An account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp ; it differs from an account current, where the sums stated to be received are not written in the account at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time. *Wright v. Shawcross*, 2 B. & A. 501, n. See *Jacob v. Lindsay*, 1 East, 460 ; *Hawkins v. Warre*, 3 B. & C. 690. A mere acknowledgment, not of the payment of money, but of a sum due and owing (as an I O U, signed by the party), requires no receipt stamp. *Fisher v. Leslie*, 1 Esp. 426 ; *Israel v. Israel*, 1 Camp. 499 ; *Childers v. Boulnois*, D. & Ry. N. P. 8. And such an acknowledgment, though

in form a receipt (being in fact for money received long before), requires no stamp: thus, "Received by B. T. 170*l.*, for which I promise to pay at the rate of 5*l.* per cent." (signed), is neither a receipt nor a promissory note, nor an agreement of the value of 20*l.* *Taylor v. Steele*, 16 M. & W. 665. So, a receipt given by the banker of a company to a shareholder, for deposit paid in, formerly needed no stamp *Clarke v. Chaplin*, 1 Exch. 26; see also *Chaplin v. Clarke*, 4 Exch. 403; but such receipt is not within exemption (1) of the present act. The signature of counsel for a fee on a brief does not require a stamp. *In re Beavan*, 5 D. M. & G. 40; 23 L. J., Ch. 536. Where it is made solely to avoid the Statute of Limitations, it is expressly exempted from an agreement stamp. 9 Geo. 4, c. 14, s. 8, *ante*, p. 221. An instrument in these terms, "Mr. T. has left in my hands 200*l.*," *Tomkins v. Ashby*, 6 B. & C. 541; or in these, "I have in my hands 3 bills which amount to 120*l.* 10*s.* 6*d.*., which I have to get discounted or return on demand," *Mullett v. Huchison*, 7 B. & C. 639; or in these, "Mr. M. has this day left with me 10*l.* on account of debt, interest, and costs," *Levy v. Alexander*, 4 Exch. 485; requires no stamp. So, the acknowledgment of the correctness of an account, containing a statement of sums advanced and disbursements made, has been held to require no stamp. *Wellard v. Moss*, 1 Bing. 134. So, "balancing up to this day. S. F., 19 Nov.," written on the back of an unstamped receipt, is evidence against S. F. of an admission of the state of account on that day, though the receipt itself is not admissible. *Finney v. Tootel*, 5 C. B. 504. And an unstamped receipt at the foot of a debtor and creditor account, signed by the party who received the balance, is evidence against him of the state of the account, the payment not being disputed. *Mattheson v. Ross*, 2 H. L. C. 286. A receipt is not inadmissible as such, because it notices the terms and consideration upon which the money was paid. *Watkins v. Hewlett*, 1 B. & B. 1. Nor, because it contains subsequent matter of agreement and has no agreement stamp; *Ody v. Cookney*, 1 M. & Rob. 517; unless the agreement controls or qualifies what goes before, when the paper will be inadmissible without an agreement stamp. *Grey v. Smith*, 1 Camp. 387. Where the indorsements of receipts on a bond have left no blank spaces for receipts of subsequent payments, such receipts written on an unstamped piece of paper annexed to the bond are within exemption (11). *Orme v. Young*, 4 Camp. 336.

Release.

"Release or renunciation of any property, or of any right or interest in any property:—

"Upon a sale. See *Conveyance on sale*," *ante*, p. 234.

"By way of security. See *Mortgage, &c.*," *ante*, p. 244.

"In any other case;—10*s.*"

Schedule.

"Schedule, inventory, or document of any kind whatsoever, referred to in or by, and intended to be used or given in evidence as part of, or as material to, any other instrument charged with any duty, but which is separate and distinct from, and not indorsed on or annexed to, such other instrument:

"Where such other instrument is chargeable with any duty not exceeding 10*s.*:—the same duty as such other instrument.

"In other case:—10*s.*"

Exemptions.] “(1.) Printed proposals published by any corporation or company respecting insurances and referred to in or by any policy of insurance issued by such corporation or company. (2.) Any public map, plan, survey, apportionment, allotment, award, and other parochial or public document and writing, made under or in pursuance of any act of parliament, and deposited or kept for reference in any registry, or in any public office, or with the public books, papers, or writings of any parish.”

If a bill of sale refers to a schedule of things sold, but is complete and intelligible without it, it may be read, though the schedule, being unstamped, may be inadmissible; *Dyer v. Green*, 1 Exch. 71; *Daines v. Heath*, 3 C. B. 938; *aliter*, if insensible without the schedule. *Weeks v. Maillardet*, 14 East, 568.

Where a lease referred to an expired lease for the covenants, the expired lease (stamped as such) was held under 55 Geo. 3, c. 184, Sched. 1, not to be “a schedule, catalogue, or inventory” requiring a stamp as such. *Strutt v. Robinson*, 3 B. & Ad. 395. So, when a lease, duly stamped as a lease, referred to the terms of an abandoned lease not stamped, the whole was considered as one lease, and admissible in evidence as such. *Pearce v. Cheslyn*, 4 Ad. & E. 225. The words of the Stamp Act, 1870, are perhaps somewhat wider.

It will be observed that this duty is only charged when the schedule “is separate and distinct from, and not indorsed on or annexed to,” the principal instrument, and when the latter is liable to duty. The original object with which this duty was imposed, was to secure duty being paid where instruments escaped progressive duty, by their being shortened in length by reference to a separate schedule; as now, however, the progressive duty has been altogether abolished, there seems no good reason for the continuance of the schedule duty.

Scrip Certificate, Scrip, &c.

See *Letter of allotment*, *ante*, p. 243.

Settlement.

“*Settlement.* Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bona fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever:—for every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled:—5*s.*”

Exemption.] “Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, created by a previous settlement stamped with *ad valorem* duty in respect of the same property, or by will, where probate duty has been paid in respect of the same property as personal estate of the testator.”

Sect. 124. “Where any money which may become due or payable upon any policy of insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby such settlement is made or agreed to be made is to be charged with *ad valorem* duty in respect of such money.”

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Provided as follows :—(1.) Where, in the case of a policy of insurance, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument ; (2.) If in any such case the instrument contains a statement of such value, and is stamped in accordance with such statement, it is, so far as regards such policy, to be deemed duly stamped, unless or until it is shown that such statement is untrue, and that the instrument is, in fact, insufficiently stamped."

Surrender.

"*Surrender*—of copyholds. See *Copyhold*," *ante*, p. 237.

"Of any other kind whatsoever not chargeable with duty as a conveyance on sale or mortgage :—10s."

Where some of the executors of a tenant from year to year signed an instrument "renouncing and disclaiming, and also surrendering and yielding up" to the landlord all right, title, &c., in the premises ; and the landlord thereupon brought ejectment ; held that such instrument was a surrender and not a disclaimer, and therefore could not be put in evidence for the plaintiff without a surrender stamp. *Doe d. Wyatt v. Stagg*, 5 N. C. 564.

Transfer of Shares in Cost-Book Mine.

"*Transfer*. Any request or authority to the purser or other officer of any mining company, conducted on the cost-book system, to enter or register any transfer of any share, or part of a share, in any mine, or any notice to such purser or officer of any such transfer :—6d."

Adhesive Stamp.] Sect. 128. (1.) This duty "may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the request, authority, or notice is written or executed."

The cost-book mine companies referred to in this act are certain unregistered companies or partnerships, within the Stannaries of Devon and Cornwall. Such companies elsewhere must, if consisting of more than twenty members, be registered and incorporated under the Companies Act, 1862, see sect. 4. Whether the company be such a cost-book company is a question of fact and not a matter of law. See *ante*, p. 80. As to what constitutes such a company, see the Introductory Notice to Procedure of the Stannary Court, ed. 1856, and Collier on Mines, 2nd. ed., Ch. 3 ; and the Stannaries Act, 1869 (32 & 33 Vict. c. 19). The written request, or notice mentioned in the Stamp Act, 1870, is the usual (but not the only) form of transfer shares in such a mine. See *Toll v. Lee*, 4 Exch. 230, cited *ante*, p. 236, where the mine was, in fact, a cost-book mine.

Warrant of Attorney.

"*Warrant of attorney* to confess and enter up a judgment given as a security for the payment or repayment of money, or for the transfer or re-transfer of stock. See *Mortgage, &c.*" *ante*, p. 244.

"*Warrant of attorney* of any other kind :—10s."

Warrant for Goods.

See *Delivery Order*, *ante*, p. 239.

COURSE OF EVIDENCE AND PRACTICE AT NISI PRIUS.

Prior to the C. L. P. Act, 1854, trials were always held before a judge and jury. Under sect. 1 of that act, a trial might by consent of the parties and leave of court take place before a judge alone. Now under Rules 1883, O. xxxvi., r. 7, the mode of trial is in general by a judge without a jury; provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury or by a judge sitting with assessors or by an official referee with or without assessors. By r. 2, in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, either party is entitled on notice to have a trial by jury. By r. 3, causes or matters assigned by the J. Act, 1873, s. 34, to the Chancery Division, shall be tried by a judge without a jury unless the court or a judge shall otherwise order. By r. 4, "the court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact or partly of fact and partly of law arising in any cause or matter which previously to the passing of the" J. Act, 1873, "could without any consent of parties have been tried without a jury." By r. 5, "the court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury." By r. 6, "in any other cause or matter upon the application of any party thereto for a trial with a jury of the cause or matter, or any issue of fact, an order shall be made for a trial with a jury." By r. 8, "subject to the provisions of the preceding rules of this order the court or a judge may in any cause or matter at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others." By r. 9, "every trial of any question or issue of fact with a jury shall be by a single judge unless such trial be specially ordered to be by two or more judges."

Trials before referees are subject to the provisions of the J. Act, 1873, ss. 57, 58, *post*, pp. 260, 261, where the decisions on these sections are collected.

Before whichever tribunal the cause is tried the rules of practice at the trial are nearly the same.

The following was the course of practice before the C. L. P. Act, 1854 :—When the jury was sworn, the junior counsel for the plaintiff opened the pleadings; after which, if the proof of the issue rested on the plaintiff, the senior counsel stated the case to the jury, and after witnesses had been examined in support of it, the counsel for the defendant was heard. If he called any witness, the plaintiff's counsel had the general reply.

By Rules 1883, O. xxxvi., r. 36 (which replace the C. L. P. Act, 1854, s. 18, in similar terms), it is provided that, "upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence; and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore."

This rule merely allows the defendant's counsel to sum up his evidence, and does not permit the counsel to comment generally on the case; *Gilford v. Davis*, 2 F. & F. 23; but it must be observed that the summing-up usually amounts to a general reply. Where a counsel has not announced

his intention to adduce evidence, in consequence of which the party who began sums up his case, he cannot afterwards be permitted to alter his mind and adduce evidence. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227. The same course of practice is usually adopted on a trial before a judge alone; *Metzler v. Wood*, 47 L. J., Ch. 139, M. V.-C.; one counsel only being heard on questions of fact; S. C.; *Conington v. Gilliat*, 1 Ch. D. 694. As to the practice peculiar to Fry, J., see *Kino v. Rudkin*, 6 Ch. D. 160, 163. A trial before a referee is conducted in the same manner as a trial before a judge. Rules, 1883, O. xxxvi., r. 49, *post*. p. 261.

Where there are several issues, some of which are incumbent on the plaintiff and others on the defendant, it is usual for the plaintiff to begin and to prove those which are essential to his case; *Jackson v. Hesketh*, 2 Stark. 521; the defendant then does the same; and the plaintiff is then entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to comment by way of reply upon such last-mentioned evidence in support of his own affirmative; and the plaintiff's counsel has a general reply. Where the judge decides that there is no evidence to go to the jury on the plaintiff's case, his counsel will not be entitled to sum up. *Hodges v. Ancrum*, 11 Exch. 214; 24 L. J., Ex. 257.

It was formerly laid down as a general rule, that when, by pleading or notice, the defence is known, the counsel for the plaintiff is bound to open the whole case in chief and cannot proceed in parts, unless some specific fact be adduced by the defendant to which the plaintiff can give an answer; and that he cannot go into general evidence in reply. *Rees v. Smith*, 2 Stark. 31. And this appears to be still the rule where a single fact or transaction forms the whole subject of dispute between the parties on the pleadings, which is affirmed on one side and denied on the other. Thus, where the plaintiff's title to a mine was in issue, and the plaintiff relied on *prima facie* evidence from possession, he was considered not to be entitled to support his case in reply by general evidence of his title. *Rowe v. Brenton*, 3 M. & Ry. 139, 281 (on a trial at bar; but the objection was waived by the defendant); *Lacon v. Higgins*, 3 Stark. 178. But where the defendant traverses, and also justifies, the plaintiff may reserve his case on the justification until the defendant has proved it. *Brown v. Murray*, Ry. & M. 254, and note *Ib.* Or he may enter upon the disproof thereof in the first instance; in which case he will not be allowed to give further evidence of the same kind in reply. *Ib.*; *Accord. Shaw v. Beck*, 8 Exch. 392. And plaintiff is entitled so to reserve his answer to the defendant's case, although his witnesses have been cross-examined so as to disclose the nature of the defence relied upon. *Ibid.* Upon the trial of issues in a patent case, the plaintiff was held entitled to call evidence in reply for the purpose of rebutting a case of prior user set up by the defendant. But after the evidence for the defence was summed up, the defendant was not allowed to adduce further evidence in answer to that given by the plaintiff in reply. *Penn v. Jack*, L. R., 2 Eq. 314.

The general rule was recognized in *Jacobs v. Tarleton*, 11 Q. B. 421, where in an action against acceptor, the issue was on the indorsement of a bill to the plaintiff. The plaintiff proved the handwriting of the indorser: the defendant *é contra*, gave evidence that the plaintiff was too poor to have given value for the bill; that he had disclaimed knowledge of it, and had denied any authority from himself to bring the action: in reply the plaintiff offered proof that he was able to discount, and had in fact discounted the bill; it was held that the proof in reply was merely confirmatory and ought not to have been received. It is observable on the report of this case that neither the evidence in defence nor in reply seems to have

been pertinent to the issue : but another report (17 L. J., Q. B. 194) shows that fraud and want of consideration by the plaintiff were also in issue on the record. In *Wright v. Wilcox*, 9 C. B. 650 ; 19 L. J., C. P. 333, it was held that the plaintiff might, and (*ut semble*) ought to, be allowed to explain by evidence a fact, which appears for the first time on the defendant's evidence ; and that the judge has a discretion in admitting evidence in reply. And where the judge allowed the plaintiff to put in additional proof of title at the close of the case, and when he was about to sum up, the court above refused to interfere with his discretion. *Doe d. Nicoll v. Bower*, 16 Q. B. 805.

Where a party tenders documentary evidence *prima facie* admissible, the other party will not, except under the rule mentioned below, be allowed to interpose with evidence for the purpose of excluding it. Thus, where plaintiff tendered an examination of defendant taken before bankruptcy commissioners, the defendant was not permitted to call witnesses to prove, before the examination was read, that it was incomplete, and therefore inadmissible. Such evidence, if not obtained by cross-examination, must be postponed as part of the defendant's case. *Jones v. Fort, M. & M.* 196. But evidence to disprove possession of an instrument, of which secondary evidence is tendered ; *Harvey v. Mitchell*, 2 M. & Rob. 366 ; or to show that a contract about which the witness is questioned is in writing ; *Cox v. Couvless*, 2 F. & F. 139, Martin, B. ; may be given immediately.

It seems that under Rules, 1883, O. xxxi., r. 15 (*ante*, p. 13), the opposite party may show that the document sought to be put in evidence was referred to in the pleadings or affidavits of the party seeking to put it in, and was not produced on notice, and is therefore inadmissible, unless the non-production be excused under the rule. See *Quilter v. Heatly*, 23 Ch. D. 42, C. A., explaining *Webster v. Whewall*, 15 Ch. D. 120.

Where the judge has expressed an opinion adverse to the admissibility in evidence of a document, the counsel seeking to put it in must formally tender it in evidence and require a note to be taken of the tender, and if this course is neglected the rejection cannot afterwards be relied on. *Campbell v. Loader*, 34 L. J., Ex. 50.

Both parties are bound by the view taken of their respective cases, and the mode of conducting them, by their counsel at the trial ; and they cannot move for a new trial upon grounds omitted to be urged at Nisi Prius. See *Doe d. Gord v. Needs*, 2 M. & W. 129 ; *Henn v. Neck*, 3 Dowl. 163 ; *Short v. Kalloway*, 11 Ad. & E. 28 ; *Haslor v. Carpenter*, 3 C. B., N. S. 172. And where counsel offers evidence for one purpose which the judge rejects, he will not, after the trial, be permitted to rely upon it as admissible for another purpose. *R. v. Grant*, 5 B. & Ad. 1081. Nor can he complain of misdirection upon a point which he has, in effect, waived at Nisi Prius. *Robinson v. Cook*, 6 Taunt. 336. And, misstatements of facts by the judge should be adverted to by counsel at the time, though counsel need not object to the law as laid down by him. *Payne v. Ibbotson*, 27 L. J., Ex. 341. And, where evidence has been admitted, without objection, as relevant to the issue, it cannot be objected to as inapplicable after the judge has begun to sum up. *Abbott v. Parsons*, 7 Bing. 563. Where the judge has, in the opinion of counsel, omitted to submit some material point or view of the case to the jury, be ought, it seems, to be reminded of it. *Magor v. Chadwick*, 11 Ad. & E. 584, 585 ; *Wedge v. Berkeley*, 6 Ad. & E. 663. But counsel will not, it is apprehended, be taken to have acquiesced in the summing up of the judge in point of law, merely because he has not interposed at the time. See *Hughes v. Gt. W. Ry. Co.*, 14 C. B. 637 ; 23 L. J., C. P. 153, *per* Cresswell, J. Where the point relied upon by counsel has been distinctly brought under the notice of the judge in the course of the cause,

it would be very inconvenient to require that counsel should again advert to it, by way of protest, while the judge is charging the jury.

A party appearing in person must examine the witnesses as well as address the jury. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254. The party in person may conduct his own cause, examine witnesses, and give evidence in his own favour. *Cobbett v. Hudson*, 1 E. & B. 11; 22 L. J., Q. B. 11. But his wife cannot claim to conduct it in his absence. S. C. 15 Q. B. 988. A barrister has no privilege to be heard both personally and by his counsel in his own cause. *Newton v. Chaplin*, 10 C. B. 356; 19 L. J., C. P. 374; *New Brunswick & Canada Ry. & Land Co. v. Conybeare*, 9 H. L. C. 711; 31 L. J., Ch. 297.

The leading counsel has a right, in his discretion, to interpose and take the examination of a witness out of the hands of his junior; but after one counsel has brought the examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doe v. Roe*, 2 Camp. 280.

Counsel for the defendant, in addressing the jury, has no right to ask them whether they are satisfied that defendant is entitled to a verdict as the case stands, without calling witnesses. *Moriarty v. Brooks*, 6 C. & P. 684, per *Ld. Lyndhurst*, C. B.

A judge at *Nisi Prius* is not bound, at the request of counsel, to put insulated questions to the jury not distinctly raised by the issue on the record, although the verdict may turn upon them; nor is the jury bound to answer them; but with the consent of parties, and where the question is simple and decisive, a judge may in his discretion put it to the jury; per *Cur.* in *Walton v. Potter*, 3 M. & Gr. 411, 433, 444; and it may be proper to do so; as where it is desirable to know on which of several grounds the verdict is given. *Ib.* 433. Where distinct and divisible wrongs, *ex. gr.* several imprisonments under different warrants are complained of, the jury may be directed to make a separate assessment of damages; and this is desirable where the legality of each warrant stands on a different footing. *Eggington v. Mayor of Lichfield*, 5 E. & B. 100; 24 L. J., Q. B. 360.

Trial of several causes together.] Where there are several different actions all depending on the same point—*e.g.* whether defendant was guilty of negligence whereby each of the several plaintiffs was injured—all the causes may, by consent, be tried together by the same jury; but *semb.* they must be sworn in each of the causes. *Pike v. Polytechnic Institution*, 1 F. & F. 712.

Trial of several issues separately.] By Rules 1883, O. xviii. r. 1, a judge may order the separate trial of causes of action, united in the same action, if they cannot be conveniently tried together. See *Freen v. Watley*, 4 F. & F. 1038.

Power to refer.] Generally, the counsel and attorneys in a cause were at common law presumed to have power to consent to refer the cause at *Nisi Prius*, and the court would not set aside an award made under such order; *Filmer v. Delber*, 3 Taunt. 486; *Faviell v. E. Counties Ry. Co.*, 2 Exch. 344; but enforced it, though the client repudiated the reference and did not attend. *Smith v. Troup*, 7 C. B. 757. But *semb.* as between the attorney and his client, the former might be liable if he referred improperly, or against the will of the latter; and it was certainly inexpedient to refer at *Nisi Prius* without the consent of parties. And, where a party was an infant, *Biddell v. Dove*, 6 B. & C. 255; or a lunatic, *Cumming v. Ince*, 11 Q. B. 112; there was no adequate authority to refer, so as to bind that party. Now see J. Act, 1873, s. 25 (11), *post*, p. 282, and cases cited *post*, p. 262.

By the C. L. P. Act, 1854, s. 3, a judge may, when the matters in dispute are wholly or in part matters of mere account, refer the matter wholly or in part to an arbitrator appointed by the parties, or an officer of the court, upon such terms as to costs, or otherwise, as he shall think reasonable. This power is still in force, and is not affected by Rules, 1883, O. xxxvi. (see r. 10), nor by the further powers given by the J. Acts to order inquiries and trials before referees, as to which *vide infra*; *Cruikshank v. Floating Swimming Baths Co.*, 1 C. P. D. 260; *Lloyd v. Lewis*, 2 Ex. D. 7, C. A.; and as any judge or commissioner sitting at *Nisi Prius* constitutes a court of the High Court (J. Act, 1873, ss. 29, 30), the objection that the power could not be exercised at *Nisi Prius* (see *Robson v. Lees*, 6 H. & N. 258; 30 L. J., Ex. 235; *Morgan v. Ainslie*, 28 L. T., N. S. 120, H. T., 1873, B. C.) no longer applies. It has been recently decided that under this provision, if *part* only of the matter in dispute is matter of account, that part alone can be compulsorily referred. *Clow v. Harper*, 3 Ex. D. 198, C. A. But the practice was previously the other way. See *Brown v. Emerson*, 17 C. B. 361; 25 L. J., C. P. 104; see also *Ward v. Pilley*, 5 Q. B. D. 427, 429, *per* Bramwell, L.J. Sect. 6 gives similar power to a judge trying an action alone to refer matters of account, and to proceed to try, and dispose of, the other matters in question as if no reference had been made.

By the J. Act, 1873, s. 56, subject to any rules of court and the right existing to have particular cases tried by jury, "any question arising in any cause or matter" before the court may be referred by the judge before whom the matter "may be pending, for inquiry and report, to any official or special referee." By sect. 57, in any cause or matter before the "court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury or conducted by the court through its other ordinary officers, the court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein, to be tried either before an official referee," "or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of court, and, subject thereto, in such manner as the court or judge ordering the same shall direct." By Rules, 1883, O. xxxvi. rr. 46, 47, official referees take references in rotation, unless (r. 47), the court or a judge direct a reference to a particular official referee. As to procedure on trial under this Act before a referee, *vide post*, p. 261.

By Rules, 1883, O. xxxiii. r. 2, "the court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

By J. Act, 1873, s. 66, a judge may order any accounts to be taken or inquiries made in the office of a district registrar for report to the court.

The distinction formerly existing between a reference under the C. L. P. 1854, and the J. Act, was that in the former case the arbitrator was constituted the sole judge of law and fact, and his award was final; under the J. Act, however, the report of the referee is made equivalent only to the verdict of a jury; all questions of law are therefore left open to either party to be taken before the court. See *Cruikshank v. Floating Swimming Baths Co.*, and *Lloyd v. Lewis*, *supra*.

This distinction is now modified by Rules, 1883, O. lxx. r. 3, which provide that "where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court might set aside the verdict of a jury. Such appeal shall be to a divisional court who shall have power to set aside the award or certificate, or to remit all or any part of the matter in dispute to the arbitrator or referee, or to make any order with respect to the award or certificate or all or any of the matters in dispute that may be just."

The effect of J. Act, 1873, ss. 56, 57, *ante*, p. 260, was much considered in *Longman v. East*, *Pontifex v. Severn*, and *Mellin v. Monico*, 3 C. P. D. 142, C. A. Those sections do not give the court power to refer the whole cause of action to a referee. S. CC. But, where in an action any of the issues are proper to be sent to be tried by an official referee, as involving matters of account, all the issues in the action may be sent for trial by him. *Ward v. Pilley*, 5 Q. B. D. 427, C. A.; *Hoch v. Boor*, 49 L. J., Q. B. 665, C. A. See further as to the construction of sect. 57, *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 674, 677, *per Brett, L. J.* The judge may, under sects. 56, 57, refer any scientific question in issue to an expert agreed on by the parties, for experiment and report to him. *Badische Anilin, &c., Fabrik v. Levinstein*, 24 Ch. D. 156.

Trial before a referee.] The J. Act, 1873, s. 57, *ante*, p. 260, enables a judge to order any question of fact or of account to be tried and heard before an official or special referee, or (sect. 56) to remit any matter to such referee for inquiry and report. By sect. 58, "in all cases of any reference to or trial by referees under this Act, the referees shall be deemed to be officers of the court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of court or (subject to such rules) by the court or judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the court) be equivalent to the verdict of a jury." Sect. 59 gives the court the same power over referees and their reports that the court had over arbitrators and their awards under the C. L. P. Act, 1854.

The rules in relation to such reference are as follows: By O. xxxvi., r. 48, "where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried with a jury." R. 49: "Subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpoena; and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge." R. 50: "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court," (r. 51) except the power to commit or enforce any order. R. 52: "The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the deci-

sion of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct; and the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or, the court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the court may direct." A referee has power to fix a peremptory appointment for the hearing. *Wenlock v. R. Dee Co.*, 49 L. T. 617, M.S. 1883. C.A. The power to direct judgment to be entered is new. See *Pontifex v. Severn*, 3 C. P. D. 142.

Power to compromise.] At common law the parties were bound by the "conduct" of the suit in court by their counsel or attorney: thus, in an action of trespass counsel might, in the absence of the parties, consent to the amount of damages, *per* Pollock, C. B., *Thomas v. Harris*, 27 L. J., Ex. 353; or to the withdrawal of a juror; *Strauss v. Francis*, L. R., 1 Q. B. 379. So, where the party was present and did not dissent from a compromise, he was bound thereby. *Chambers v. Mason*, 5 C. B., N. S. 59; 28 L. J., C. P. 10; *Rumsey v. King*, 33 L. T., N. S. 728, Q. B., H. S., 1876. And generally, an attorney acting *bond fide*, reasonably, and skilfully, and not having express instructions not to compromise, was justified in doing so. *Per* Campbell, C. J., *Fray v. Voules*, 1 E. & E. 839; 28 L. J., Q. B. 232; *Choun v. Parrott*, 14 C. B., N. S. 74; 32 L. J., C. P. 197; *Prestwich v. Poley*, 18 C. B., N. S. 806; 34 L. J., C. P. 189. Where the plaintiff's attorney, in an action to recover the price of a piano, agreed to settle the action by the return of the piano and payment of costs, the court upheld the compromise. S. C. The power of counsel or attorney to compromise was much discussed on rules for attachment in the case of *Swinfen v. Swinfen*, 18 C. B. 485; 25 L. J., C. P. 303; 1 C. B., N. S. 364; 26 L. J., C. P. 97. In S. C. in Equity, it was held that neither counsel nor attorney could compromise the suit at Nisi Prius; 24 Beav. 549; 2 De G. & J. 381; 27 L. J., Ch. 35, 491; though the L. J. in so deciding declined to lay down any general principle on the subject. See also *Green v. Crockett*, 34 L. J., Ch. 606. And it seems that in equity, where a party has inadvertently consented to an order, he may withdraw his consent before the order is drawn up. *Holt v. Jesse*, 3 Ch. D. 177. And now see J. Act, 1873, s. 25 (11), *post*, p. 282.

As to what liability a counsel or solicitor incurs to his client by settling an action contrary to the client's wishes, see *Swinfen v. Chelmsford, Ltd.*, 5 H. & N. 890; 29 L. J., Ex. 382; *Fray v. Voules*, and *Choun v. Parrott*, *supra*.

Who is to begin.] It is often a subject of inquiry whether the plaintiff or the defendant is to open the facts and evidence to the jury. This may be an advantage, and is then claimed as a *right*; as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case; or it may be a *burden*; as where a party relies on the witnesses of his opponent, or on the difficulty of the proofs incumbent on him.

The right or obligation to begin, generally depends on the nature of the issue, and also on the rules respecting the *onus probandi* at the commencement of the trial (see *ante*, pp. 89, *et seq.*); and the test has been said to be, not on which side the affirmative lies, but *which side will be entitled to a verdict if no evidence be given*. *Leete v. Gresham Insurance Co.*, 15 Jurist, 1161, Ex. M. T. 1851. Thus, where the plaintiff declared for unworkmanlike execution of a contract, and defendant pleaded that it was executed in a

workmanlike way, and thereupon issue was joined, it was held that plaintiff was to begin; for it was not to be assumed that the work was bad. *Per* Alderson, B., *Amos v. Hughes*, 1 M. & Rob. 464. This test, however, is only another way of stating the common rule that he, on whom the burden of proof lies, must begin: for this must be ascertained before it can be determined which side is entitled to the verdict. As a general rule the proof lies on him who affirms, except in cases where the presumption of law or fact is in favour of the affirmative. It must, however, be borne in mind that regard must be had to the effect and substance of the issue and not to its grammatical form. *Soward v. Leggatt*, 7 C. & P. 615, *per* Ld. Abinger; *Amos v. Hughes*, *supra*.

It will be seen, by a careful comparison of the cases collected below, that the most general criterion that can be given as to the right to begin is, that "he begins who in the absence of proof on either side would substantially fail in the action." This includes those actions for unliquidated damages noticed below, in which the plaintiff must give some evidence in order to get substantial damages, although he would, if no evidence were given on either side, be entitled to a verdict for a nominal amount, for such a verdict would be a substantial failure. See 45 L. T., pp. 196, 219, on *The Right to begin*.

Where, in an action by indorser against acceptor, defendant pleaded that the bill was for the drawer's accommodation, and that plaintiff did not give any consideration to the drawer, to which plaintiff replied that it was indorsed to him by the drawer for a good consideration: held, that as a consideration is presumed, the defendant must begin by proving the want of it, or some suspicious circumstances to throw the proof on the plaintiff. *Mills v. Barber*, 1 M. & W. 425; *Accord. Lewis v. Parker*, 4 Ad. & E. 838. In a declaration on a policy on a life, the plaintiff averred that the deceased had led a temperate life, which was denied by the plea; held that the *onus probandi*, and therefore the right to begin, was with the plaintiff, as he was bound to give some evidence that the life was insurable; though it was contended that intemperance was not to be presumed. *Huckman v. Fernie*, 3 M. & W. 505; *Accord. Rawlins v. Desborough*, 2 M. & Rob. 70. And the same point was ruled in two other cases in which the issue raised on the plea was respecting the health of the insured; *Geech v. Ingall*, 14 M. & W. 95; *Ashby v. Bates*, 15 M. & W. 589; although the plea, alleging a specific complaint, ended with a verification in the last case. Where an issue on the sanity of a person was directed by chancery, the court presumed that the person ordered to be plaintiff was to begin. *Frank v. Frank*, 2 M. & Rob. 314.

So, in general, if the affirmative of the issue lies on the defendant, and the plaintiff does not seek to recover unascertained damages within the rule on that subject presently noticed, the defendant's counsel begins (after the pleadings have been opened by the plaintiff), and has the general reply. *Cotton v. James*, M. & M. 275; *Jackson v. Hesketh*, 2 Stark. 518. So, where *lib. ten.* was pleaded, and no general issue. *Pearson v. Coles*, 1 M. & Rob. 206. So, where the defendant, a constable, being sued in trespass pleaded a justification without the general issue, it was held that his counsel, admitting a demand of a copy and perusal of the warrant (24 Geo. 2, c. 44) and the damages claimed, was entitled to begin. *Burrell v. Nicholson*, *Id.* 305. To trespass *q. c. f.* the defendant pleaded a right to a watercourse and entry to remove obstructions, the plaintiff traversed the right: held, that the judge might properly allow the defendant to begin, unless the plaintiff undertook to prove substantial damage. *Chapman v. Rawson*, 8 Q. B. 673. So, where a defendant in replevin pleads property in a third person, A., and not in the plaintiff, to which the plaintiff replies

that the property is not in A. but in the plaintiff, the defendant is entitled to begin. *Colstone v. Hiscolbs*, 1 M. & Rob. 301. And where, to an action of covenant for repayment of money, the defendant pleaded that the deed was given to secure money lost by gambling, it was ruled that the defendant was entitled to begin. *Hill v. Fox*, 1 F. & F. 136.

But, where by order of court the defendant is under an obligation to admit the plaintiff's case, this does not necessarily deprive the plaintiff of his right to begin. *Thwaites v. Sainsbury*, 5 C. & P. 69. Nor, does the admission by the defendant's counsel of all the facts, the proof of which are on the plaintiff, give the defendant the right to begin, where the admission of these facts might have been made in pleading. *Pontifex v. Jolly*, 9 C. & P. 202; *Price v. Seaward*, Car. & M. 23.

In many cases where damages and not the decision of a mere right, have been the object of an action, defendants used so to plead as to take an affirmative issue on themselves, and thereby attempt to exclude the plaintiff's right to a general reply. The judges, however, came to a resolution that "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." *Mercer v. Whall*, per Ld. Denman, C. J., 5 Q. B. 447, 462. The resolution, however, is not to be taken as confined to those actions, or introducing a new practice, but as a declaratory of a principle applicable to other actions. See *Ib.* 456, 463. The general rule, therefore, as laid down in this case, is, that wherever the record shows that something, even damages only, is to be proved by the plaintiff, he ought to begin, whether the action be in contract or tort. Where the damages are of *ascertained amount*, or *must be nominal*, then it seems that the defendant may begin, if the pleading will admit of it. See *Ib.* 455, 465. See further as to this resolution *Cannam v. Farmer*, *infra*, and cases cited in *Mercer v. Whall*, *supra*. Thus, in covenant for dismissing a clerk, the defendant pleaded misconduct, and plaintiff replied *de injuria*, &c.; held that plaintiff ought to begin. S. C. So, in an action on a promissory note to which defendant pleads, *inter alia*, payment into court, and issue is joined as to damages *ultra*, the plaintiff is to begin, though other issues lie on the defendant. *Booth v. Mills*, 15 M. & W. 669. On a note by the defendant, to which she pleads coverture when she made it, on which issue is joined, the defendant is to begin, although the plaintiff seeks to recover interest, not mentioned on the note. *Cannam v. Farmer*, 3 Exch. 698. In replevin, and avowry for rent, plaintiff pleaded discontinuance of receipt for 20 years, and no distress within 20 years after the right accrued: replication, distress within 20 years and issue: held that plaintiff should begin, because he must show *when* the distress was made. *Collier v. Clark*, 5 Q. B. 467. In trespass *q. c. f.*, where the defendant pleaded a custom to divert water, which was traversed by the plaintiff, the defendant was allowed to begin; though the plaintiff's counsel asserted his intention of asking for heavy damages. *Bastard v. Smith*, 2 M. & Rob. 129; and per Tindal, C. J., "The plaintiff might have traversed the custom and new assigned excess, and then would have had a right to begin." *Ibid.* 132. Under Rules 1883, O. xxiii., r. 6, the plaintiff instead of new assigning would amend his statement of claim or reply specially. In a similar action the defendant was also held entitled to begin, as the plaintiff's counsel would not pledge himself to go in for substantial damage. *Chapman v. Rawson*, 8 Q. B. 673. In *Cann v. Facey*, cor. Gurney, B., Exeter Sum. Ass. 1835, in an action of trespass for shooting a dog, where a defendant justified to prevent it from trespassing, the plaintiff was held entitled to begin, though the defendant offered to admit the value of the dog; for *per Cur.*, "the plaintiff may have damages beyond that amount;" and a similar ruling by Ld. Tenterden was cited.

Accord. in a case of justification for shooting a mad dog; *Shapland v. Cockram*, Exeter Sum. Ass. 1844, *per* Patteson, J., after consulting Wightman, J. So, in *Mills v. Stephens*, Exeter Spring Ass. 1838, Bosanquet, J., held that plaintiff had a right to begin in a case of trespass for breaking into his house, where the issue was on a plea of leave and licence.

Under Rules, 1883, O. xxi, r. 4, "no denial or defence shall be necessary as to damages claimed, or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted." See also O. xix, r. 17, *ante*, p. 72. But where the damages sought to be recovered are unliquidated, yet if the defendant admit at the trial the amount claimed in the plaintiff's particulars, he will be entitled to begin provided the material allegations in the defence are affirmative only. *Lacon v. Higgins*, 3 Stark. 178; *Morris v. Lotan*, 1 M. & Rob. 233; *Bonfield v. Smith*, 2 M. & Rob. 519; S. C. 3 C. & P. 463; *Woodgate v. Potts*, 2 Car. & K. 258; *Tindall v. Baskett*, 2 F. & F. 644, and 1 Taylor, Evid., § 355.

Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he has a right to begin as to all; *Rawlins v. Desborough*, 2 M. & Rob. 328; *Collier v. Clarke*, 5 Q. B. 467; and it seems that judgment by default as to part has the same effect, though the defendant pleads affirmatively as to the residue; see *Wood v. Pringle*, 1 M. & Rob. 277. But where, to an action on a bill and on an account stated, defendant pleaded payment to the first and non assumpsit to the second count, it was held that the plaintiff had no right to begin unless his counsel undertook to give some evidence of the account stated besides the bill. *Smart v. Rayner*, 6 C. & P. 721; *Mills v. Oddy*, *Id.* 728; overruling *Homan v. Thompson*, *Id.* 717, *omn. cor.* Parke, B.; *Frith v. McIntyre*, 7 C. & P. 44; *Oakeley v. Ooddeen*, 2 F. & F. 656; S. P. ruled by Cresswell, J., in *Lanyon v. Davey*, Bodmin Summer Ass. 1842. The plaintiff in replevin has the same right as in other actions, though both parties are actors. *Curtis v. Wheeler*, M. & M. 493.

Who is to begin in action for recovery of land.] In the now superseded action of ejectment the defendant might in some cases, by admitting a title in the plaintiff, entitle himself to begin, and the same principles will apply to the action for recovery of land introduced by the J. Acts, notwithstanding the use of pleadings therein. Thus, where the plaintiff claims as heir-at-law, and defendant as devisee, it is a settled rule that the defendant, by admitting plaintiff's pedigree and the dying seised, may entitle himself to begin and to reply. *Goodtitle d. Revett v. Braham*, 4 T. R. 497; *Acc. Fenn v. Johnson*, Adam's Eject., 2nd ed. 256, and *Mercer v. Whall*, 5 Q. B. 464, *per cur.* And the same principle applies although one of the plaintiffs had, since the death of the testator, become assignee of an outstanding term in part of the land; for "the real question in dispute is the validity of the will." *Doe d. Smith v. Smart*, 1 M. & Rob. 476, *per* Gurney, B., after conferring with Patteson, J. For the same reason, where the plaintiff claimed as heir of C. and as devisee and heir of R., who was C.'s heir, and the defendant claimed as devisee of C., the defendant's counsel was permitted to begin on admitting that plaintiff was heir of C. and of R., and entitled to recover, unless defendant proved C.'s will. *Doe d. Wollaston v. Barnes*, *Id.* 386, *cor. Ld. Denman, C.J.* See observations on this case in *Doe d. Bather v. Brayne*, 5 C. B. 655. Where the plaintiff claims as devisee of A., and the defendant as devisee under a subsequent will of A., the defendant cannot, by admitting the seisin of A. and the *prima facie* title of the plaintiff, entitle himself to begin. S. C., overruling *Doe d. Corbett v. Corbett*, 3 Camp. 368.

Generally, in order to entitle the defendant to begin by admitting the

plaintiff's case, he must admit the *whole* without qualification. *Doe d. Pill v. Wilson*, 1 M. & Rob. 323. Therefore, where the plaintiff claims as the heir of A., and defendant under a conveyance by A. in his lifetime, the latter cannot deprive the plaintiff of the right to begin by only admitting the heirship of the plaintiff and seisin of A. *unless* defeated by the conveyance; *Doe d. Tucker v. Tucker*, M. & M. 536; for it is part of the plaintiff's case that A. died seised. So, where each party claimed as heir, and defendant admitted that plaintiff was entitled as heir *if* defendant was not legitimate: held, that he could not by so doing obtain a right to begin. *Doe d. Warren v. Bray*, *Id.* 166.

Direction of judge as to who is to begin.] An erroneous ruling of the judge as to the proper party to begin will not, as a matter of course, entitle the party to a new trial. *Brandford v. Freeman*, 5 Exch. 734; *Burrell v. Nicholson*, 1 M. & Rob. 304; *Bird v. Higginson*, 2 Ad. & E. 160. But a clear case of error, by which an undue advantage may have been given to the successful party, or injustice done, is ground of new trial. *Ashby v. Bates*, 15 M. & W. 589; *Edwards v. Matthews*, 4 D. & L. 721; and one was accordingly granted in *Doe d. Bather v. Brayne*, *ante*, p. 265.

Right to reply.] In general, the party who begins has a right to the general reply when the opposite party calls witnesses. Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entirely new case, which again the plaintiff controverts by evidence, the defendant's reply is confined to the new case set up by him, for upon that relied on by the plaintiff the defendant's counsel has already commented in the opening of his own case; and the plaintiff is then entitled to the general reply. 1 Stark. Ev. 384. In strictness, Rules, 1883, O. xxxvi., r. 36, *ante*, p. 256, make no difference in this respect, for it only enables the defendant to sum up his case; but this rule is not closely adhered to; *vide ante*, p. 256.

Unless the defendant give evidence, the plaintiff is not entitled to reply, there being no new facts upon which his counsel can comment. Where the defendant, on being called on by the plaintiff to produce a document, interposes with evidence to show it is not in his possession, this gives no general reply. *Harvey v. Mitchell*, 2 M. & Rob. 366.

Where the counsel for the defendant opened material facts to the jury, which he called no witness to prove, it was in the discretion of the judge to permit the plaintiff's counsel to reply. *Crerar v. Sodo*, M. & M. 86. And, where the defendant's counsel in a crown case read a paper or made statements of material facts likely to have weight with the jury without attempting to prove them, both Ld. Kenyon and Ld. Tenterden permitted a general reply. *R. v. Bignold*, D. & Ry. N. P. C. 59. As, however, under O. xxxvi., r. 36 (*ante*, p. 256), the defendant's counsel has to announce his intention to call witnesses at the close of the plaintiff's case, if he do not do so, he would not be allowed to open fresh facts in his speech, for it has been held that when he has allowed the plaintiff's counsel to sum up, he cannot afterwards change his mind. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227.

Arguments of counsel.] When points of law arise incidentally, all the counsel on both sides are usually heard by the court; and the leading counsel of the party making the objection, or submitting the point, alone replies. But, on the claim of a right to begin, Ld. Denman ruled that one counsel only was to be heard on each side. *Rawlins v. Desborough*, 3 M. & Rob. 70. This rule, however, is not always adhered to. See *Bastard v. Smith*, *Id.* 132. If the defendant's counsel goes for a nonsuit on a point of

law, and the plaintiff's counsel answers it, the defendant's counsel has a right to reply upon the law only. *Arden v. Tucker*, 1 M. & Rob. 192.

The objection of a witness to a question which he considers himself not bound to answer is not a point on which counsel in the cause are heard. *R. v. Adey*, 1 M. & Rob. 94, *ante*, p. 164. Nor is his obligation to produce documents, *ante*, p. 147.

Where the party conducts his case, addresses the jury and examines witnesses in person, it is questionable whether counsel can be heard for him on a point of law. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254; *Moscatti v. Lawson*, *ib.* 454. In the latter case, Alderson, B., said that, though there were many precedents, it was a very objectionable practice. It has been decided that a party, who conducts his own case, cannot on that account be excluded from giving evidence as a witness. *Cobbett v. Hudson*, 1 E. & B. 11.

See Rules, 1883, O. xxv., r. 2, *post*, p. 273, as to points of law.

Separate defence of co-defendants.] In an action for the price of goods, in which the defendants appeared and pleaded non assumpsit by separate attorneys and counsel, but relied on the same defence (*viz.* payment), it was ruled by Gibbs, C. J., that the senior counsel could alone address the jury, and the witnesses were to be examined by the counsel successively, in the same manner as if the defence were joint and not separate: "It cannot be left in the power of defendants, whose interests are the same, to make twenty cases out of one." *Chippendale v. Masson*, 4 Camp. 174. And, in ejectment, where the defendants defended in the same right, but by different attorneys and counsel, Ld. Tenterden ruled that only one counsel could address the jury. *Doe d. Hogg v. Tindal*, M. & M. 314. So in *Mason v. Ditchbourne*, 1 M. & Rob. 462, n., in debt on bond, plea *non est factum* and fraud, Ld. Abinger refused to allow two counsel to address the jury, "for there could not be a verdict for one, and against the other, defendant."

But, in an action *ex delicto*, where defendants have pleaded and appeared by separate attorneys and counsel, separate cross-examinations and addresses have been permitted by Abbott, C. J.; *King v. Williamson*, 3 Stark. 162; and by Tindal, C. J., in *Massey v. Goyder*, 4 C. & P. 162, and in *Southey v. Tuff*, C. P. sittings after T. T. 1834, MS.; and even in *assumpsit*, under similar circumstances, the same course was allowed and was approved by the court *in banc* in *Ridgway v. Philip*, 1 C. M. & R. 415; in which case, however, it appears, by another report, that one of the defences was misjoinder of defendants as partners. S. C., 3 Dowl. 154.

Where the defendants appear by the same solicitor and plead a joint defence, the practice is to hear one counsel only. So held in trover plea, not guilty. *Perring v. Tucker*, M. & M. 392. And in debt, where the defence under plea of never indebted was that *all* the defendants were not parties to the contract, the court would not hear more than one counsel. *Nicholson v. Brooke*, 2 Exch. 213. It seems, however, to be a matter of discretion with the judge at Nisi Prius. S. C. A defendant does not, by appearing at the trial in person, acquire any right to address the jury, which he would not have if he appeared by counsel. *Perring v. Tucker*, *supra*. In *King v. Williamson*, *supra*, only one counsel was allowed to examine those witnesses who had been subpoenaed by both defendants. In cases where the defendants have no right to a separate address or examination, yet the counsel of any will be heard on a legal objection; as that there is no evidence against one of them; *per* Tindal, C. J., in *Poole v. Sidden and another*, C. P. sittings after M. T. 1832, MS. (on the general issue to *indeb. assumpsit*).

When two were made defendants in an issue out of chancery whose interests were at variance with each other, the counsel of each was allowed to address the jury and prove his case separately and in succession; the wit-

nesses of each might be cross-examined by the co-defendant's as well as the plaintiff's counsel; and the plaintiff had the general reply. *Phillips v. Willetts*, 2 M. & Rob. 319, and *Wynne v. Wynne*, cited *Id.* 321. The order in which co-defendants shall examine and address seems to be in the judge's discretion. *Fletcher v. Crosbie*, *Id.* 417.

Where it was ordered, on an issue out of chancery, that a third party "should be at liberty to attend the trial," the counsel for such party might cross-examine and suggest points of law, but could not call witnesses or address the jury. *Wright v. Wright*, 7 Bing. 458.

As to practice where the plaintiff has joined defendants with the view of obtaining relief against them in the alternative, see *Child v. Stenning*, 7 Ch. D. 413.

Set-off and counter-claim.] Set-off and counter-claim are now in the same position as if they formed a statement of claim by the defendant against the plaintiff; and under Rules, 1883, O. xxi., r. 16, although the action is stayed, discontinued, or dismissed, the counter-claim may be proceeded with; and by r. 17, *post*, p. 273, judgment may be given for the defendant for any balance found to be due to him.

Third Party.] Where the defendant claims to be entitled to contribution or indemnity over against any party not a party to the action, the defendant may bring him in under Rules, 1883, O. xvi., rr. 48-53. The directions for trial given by the Court or judge under r. 52, will regulate the manner in which the questions are to be tried, and under r. 53 the third party may have leave to defend the action. Under r. 54, *post*, p. 276, the Court or a judge has power to decide all questions of costs. R. 55 places a co-defendant against whom a defendant seeks contribution or indemnity in the same position as a third party. Under this rule contribution may be ordered between co-defendants. *Sawyer v. Sawyer*, W. N. 1883, p. 212, MS. Chitty, J.

Exception for misdirection.] The J. Act, 1875, s. 22, enacts that nothing in the J. Act, 1873, "nor in any rule or order made under the powers thereof or of this Act shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues. Provided also, that the said right may be enforced either by motion in the High Court of Justice, or by motion in the Court of Appeal, founded upon an exception entered upon or annexed to the record." The Rules, 1883, O. lviii. r. 1, direct that all appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way. As to the duty of the judge in directing the jury, *Edmonds v. Prudential Assur. Co.*, 2 Ap. Ca. 487, 507, *per* Ld. Blackburn. The judge is bound to direct a verdict for the defendant, unless there is some evidence on which the jury may reasonably act; a mere scintilla of evidence is not sufficient. *Ryder v. Wombwell*, L. R., 4 Ex. 32, 39, Ex. Ch.; *Giblin v. McMullen*, L. R., 2 P. C. 317, 335; *Steward v. Young*, L. R., 5 C. P. 122, 128; *Daniel v. Metropolitan Ry. Co.*, L. R., 5 H. L. 45; *Jackson v. Id.*, 3 Ap. Ca. 193, D. P. See further *Slattery v. Dublin, Wicklow, &c. Ry. Co.*, *Id.* 1155, D. P.; *Davey v. L. & S. W. Ry. Co.*, 11 Q. B. D. 213; 12 *Id.* 70, C. A. The rule is, that if the evidence be such that the jury could conjecture only, not judge, it ought not to go to the jury, and the onus lies on the party offering the evidence; and if he offers only evidence consistent with either supposition of fact, he is not entitled to have it put to the jury; *per* Ld. Tenterden, C. J., referred to by Cresswell,

J., in *Avery v. Bowden*, 6 E. & B. 953, 974 ; 26 L. J., Q. B. 3, and cited by Willes, J., in *Phillipson v. Hayter*, L. R., 6 C. P. 42, 43.

Discontinuance.] By Rules, 1883, O. xxvi., r. 1, "save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may, before, or at, or after the hearing or trial upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The court or a judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim, to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave." This rule seems to deprive the plaintiff of his right to be nonsuited. It may be observed that it does not in terms prohibit a defendant from withdrawing his counter-claim. By r. 2 a cause may be withdrawn by either party "upon producing to the proper officer a consent in writing signed by the parties."

Effect of opposite party not appearing at trial.] By Rules, 1883, O. xxxvi., r. 31, "if, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him." If the burden of proof is on the defendant, the plaintiff need not, it seems, in this case have the jury sworn. See *Lane v. Eve*, *infra*.

By r. 32, "if, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action ; but if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies upon him." In the former case the defendant need not have the jury sworn. *Lane v. Eve*, W. N., 1876, p. 86, *per* Denman, J. Where the plaintiff declines to proceed at the trial, judgment will be given under this rule dismissing the action. *Robinson v. Chadwick*, 7 Ch. D. 878.

By r. 33, "any verdict or judgment obtained where one party does not appear at the trial may be set aside, by the court or a judge, upon such terms as may seem fit, upon an application made within six days after the trial. Such application may be made either at the assizes or in Middlesex." Where the default arises from inadvertence, the application will be granted on payment of the costs of the day, including all costs that have been wasted, and the costs of the application. *Burgoine v. Taylor*, 9 Ch. D. 1, C. A.

Where one party appears, but the opposite party does not appear, the former may proceed and obtain judgment without proving service of notice of trial. *James v. Crow*, 7 Ch. D. 410, Fry, J., following *Ex parte Lowe*, Id. 160, C. A., and overruling his decisions in *Cockle v. Joyce*, Id. 56, and *Cockshott v. L. General Cab Co.*, 47 L. J., Ch. 126.

Amendment at Nisi Prius.] By Rules, 1883, O. xxviii., r. 1, "The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." By r. 6, application for leave to amend may be made "to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just." By r. 12, "the court or judge may

at any time, and on such terms as to costs or otherwise as the court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings." An amendment may be allowed at the trial, so as to raise a new case requiring fresh evidence. *Budding v. Murdoch*, 1 Ch. D. 42; *King v. Corke*, *Id.* 57. See also *Roe v. Davies*, 2 Ch. D. 729. The provisions of the C. L. P. Acts, 1852, s. 222; 1854, s. 96; and 1860, s. 36, which are still in force are expressed in very similar terms. Under those sections many of the cases collected below were decided.

All amendments ought to be made that are necessary and proper, for the object of the rules is to meet cases in which, by mistake or oversight, the real matter in issue is not raised by the pleadings, and under it the matter may be put on the record which was not on it before, if it be shown to the satisfaction of the judge to be the existing matter in controversy. What that matter in controversy may be is a matter of fact to be determined by the judge upon the evidence and pleadings before him. See Maule, J., in *Wilkin v. Reed*, 15 C. B. 192; 23 L. J., C. P. 193; *Blake v. Done*, 7 H. & N. 465; 31 L. J., Ex. 100. It seems that leave to amend should always be given unless the judge is satisfied that the party applying is acting *malâ fide*, or that by his blunder he has done some injury to his opponent which cannot be compensated for by costs or otherwise. *Tildesley v. Harper*, 10 Ch. D. 393, 396, 397, *per* Bramwell, L. J. See also *Laird v. Briggs*, 19 Ch. D. 22, C. A. An amendment should not be allowed for the purpose of trying a question which has arisen at the trial, but is not that which the parties came to try. *Wilkin v. Reed*, *supra*; *Lucas v. Tarleton*, 3 H. & N. 116; 27 L. J., Ex. 246; *Ritchie v. Van Gelder*, 9 Exch. 762; *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13. Thus, where the action was for fraudulently misrepresenting to the plaintiff the cause for which the defendant had discharged a servant from his service, and it turned out at the trial that the defendant had improperly suppressed the fact of the servant's dishonesty, but had truly stated the cause of his discharge, it was held that, as this suppression was not in fact the ground of the plaintiff's complaint, but only the supposed misrepresentation, which was negatived, the judge had rightly refused to amend by substituting a charge of fraudulent suppression. *Wilkin v. Reed*, *supra*. No amendment will be allowed so as to prejudice the other party. The plaintiff ought at first to state his cause of action, if there was one truly and in substance according to the facts, in order that the defendant may know whether he should object to their sufficiency in point of law, admitting the facts, or, denying them, go to trial. It would be better that there should be no trial at all, than that a plaintiff should be allowed to state one cause of action, and then, on any difficulty arising as to his maintaining it on the evidence, to amend so as to raise another and different cause of action. It would be far better to require no pleadings at all, than to allow pleadings which could only operate as a snare. *Bradworth v. Foshaw*, 10 W. R. 760, Ex. T. T. 1862, *per cur.* See also *Riley v. Bazendale*, 30 L. J., Ex. 87, 88, *per* Martin, B.; *Newby v. Sharpe*, 8 Ch. D. 39, C. A.; *New Zealand &c., Co. v. Watson*, 7 Q. B. D. 374, 382.

In some cases the nature of the action may be a ground for refusing an amendment; as where it was founded on an agreement to commit a fraud on a foreign state. *Brennan v. Howard*, 1 H. & N. 138. On this motive for refusal, however, there is a difference of opinion on the bench; see *Hughes v. Bury*, 1 F. & F. 374, *per* Crowder, J. Where a tenant in common brought an action of trespass and trover against his co-tenant for cutting and carrying away the whole produce of the common property, and the action was held not maintainable, the court refused to mould the action into one

of account, on the ground that such an action was so distinct from the one stated in the declaration, that the amendment would not do justice between the parties. *Jacobs v. Seward*, L. R., 4 C. P. 328; L. R., 5 H. L. 464. If the amendment is to insert in the breach a claim on which the plaintiff can recover only nominal damages, and in respect of which defendant would probably not have defended the action, the judge will be justified in refusing it. *Times Insurance Co. v. Hawke*, 28 L. J., Ex. 317. See also *Spoor v. Green*, L. R., 9 Ex. 99. Where the amendment would evade the real question in controversy, it should be refused. Thus, where the plaintiff claimed a larger easement than he proved at the trial, the judge would not allow him to limit it by amendment, if in fact the larger claim was the one really claimed and asserted by plaintiff and resisted by defendant. *Cawkwell v. Russell*, 26 L. J., Ex. 34.

A variance between the statement of claim and a record, on the denial of the latter is amendable. *Noble v. Chapman*, 14 C. B. 400; 23 L. J., C. P. 56; *Hunter v. Emanuel*, 15 C. B. 290; 24 L. J., C. P. 16. The judge may, if he thinks fit, add a claim at Nisi Prius. *Taylor v. Shaw*, 1 Com. Law Rep. 1057; *Robinson v. Davison*, L. R., 6 Ex. 269, 270; *Wilby v. Elgee*, L. R., 10 C. P. 497. So in *Isaacs v. Pickard*, 1 F. & F. 672, where a count for not accepting a bill of exchange was added to one for goods sold, and the defendant made to plead to it *instantly*, with leave to plead several pleas. A plea of payment into court has been allowed to a count added at the trial. *Robson v. Turnbull*, 1 F. & F. 365. In an action against the directors of a building society who had signed a loan note on behalf of the society, brought for the money lent, a count alleging breach of warranty of authority in the directors to borrow money for the society was added. *Richardson v. Williamson*, L. R., 6 Q. B. 276. See also *Mountstephen v. Lakeman*, L. R., 5 Q. B. 613, 614; L. R., 7 H. L. 17.

An injury to the possession may be altered to an injury to the reversion. *May v. Footner*, 5 E. & B. 505; 25 L. J., Q. B. 32. In a count for falsely representing the value of defendant's business at 100*l.* per month, the judge inserted the words "over the counter," that being the real question to be tried. *Roles v. Davis*, 4 H. & N. 484; 28 L. J., Ex. 287. In an action on a mortgage-deed, a claim for interest was inserted at Nisi Prius, and was again struck out on an application to re-amend at the same trial; and the court, on motion, refused to interfere with the judge's discretion. *Morgan v. Pike*, 14 C. B. 473; 23 L. J., C. P. 64. In an action to recover instalments of an annuity, an amendment of the claim to the declaration was allowed so as to include a later instalment due before action. *Knowlman v. Bluett*, L. R., 9 Ex. 1. But in an action which had slept for some years, and which had been revived against the executors of the defendant, leave to amend the claim and particulars by increasing the amount sought to be recovered, adding items which would be barred by the Statute of Limitations, was refused. *Pearce v. Preston*, 11 W. R. 35, Q. B., M. T. 1862. An amendment of the statement of claim may be allowed in an action of libel, on the ground of variance with the libel proved. *Rainy v. Bravo*, L. R., 4 P. C. 287.

In like manner the statement of defence may be amended at the trial, in order to meet the facts proved at it. *Mitchell v. Cresswell*, 13 C. B. 237; 22 L. J., C. P. 100. A plea of payment was added to other pleas in an action on a guarantee, in *Laurie v. Scholefield*, L. R., 4 C. P. 622. In an action for wrongful dismissal of the manager of plaintiff's business, a defence by reason of plaintiff's dismissal for misconduct was added on the trial by Cresswell, J., though no misconduct was alleged in the other pleas. *Hobson v. Cowley*, 27 L. J., Ex. 205. In an action for false imprisonment the defendant was allowed to amend the grounds of suspicion alleged in his

plea of justification. *Hailes v. Marks*, 7 H. & N. 56; 30 L. J., Ex. 389. A plea of "not guilty by statute" was amended by inserting the proper statutes in the margin. *Edwards v. Hodges*, 15 C. B. 477; 24 L. J., M. C. 81.

It seems that the time to apply for an amendment by either party is at the close of his case. See *Rainy v. Bravo*, L. R., 4 P. C. 287, 298. It is not unusual for amendments to be made at the trial without imposing any condition of payment of costs, or of giving further time.

In *Tennyson v. O'Brien*, 5 E. & B. 497, on a contract for delivery of goods by the plaintiff the plea denied the readiness of plaintiff to deliver at the time specified. At the trial it appeared that the delivery had been postponed at the defendant's request, and the judge allowed an excuse for non-delivery to be inserted on the declaration, and refused to postpone the trial; whereupon the defendant refused to amend his former plea, or to appear further. Held, that the amendment was justifiable, and that defendant was not necessarily entitled to postponement, it not appearing that he was prejudiced on the merits by the refusal to postpone. The plea being proved as it stood, a verdict was taken on it for the defendant, and the plaintiff obtained judgment *non obstante veredicto* on motion. Where, however, it will be evidently proper to give more time to the opposite party, the applicant will probably be made to pay the costs of the day. See *Edwards v. Hodges*, *supra*.

When a defence has been held to be evasive or insufficient, and thereby to admit the allegations in the statement of claim, under Rules, 1883, O. xix. rr. 13, 19, leave to amend has often been refused in the Chancery Division. *Thorp v. Holdsworth*, 3 Ch. D. 637; *Byrd v. Nunn*, 5 Ch. D. 781; 7 Ch. D. 284, C. A.; *Collette v. Goode*, *Id.* 842. See also *Croze v. Barnicot*, 6 Ch. D. 753, and *Tildesley v. Harper*, 7 Ch. D. 403, *cor. Fry, J.*; this last case was however reversed with costs, 10 Ch. D. 393, C. A., cited *ante*, p. 270.

The Courts are very unwilling to disturb decisions of judges made in the exercise of discretion vested in them. *Morgan v. Pike*, *ante*, p. 271; *Brennan v. Howard*, *ante*, p. 270; *Schuster v. Wheelwright*, 8 C. B., N. S. 383; 29 L. J., C. P. 222; *Byrd v. Nunn*, 7 Ch. D. 284, C. A. And a new trial will not be directed upon the ground of surprise occasioned by an amendment at Nisi Prius, unless substantial injustice has been done. *White v. S. E. Ry. Co.*, 10 W. R. 564, Ex. E. T. 1862. Sometimes the amendment is made at Nisi Prius, subject to the approval of the court. In *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117, the court disallowed on amendment so made at the trial, on the ground that the amendment made the pleading reasonably open to a demurrer.

A judge at Nisi Prius may amend an erroneous entry of the verdict. See *Baker v. Lawrence*, 18 W. R. 835, T. T. 1870, C. P. And even after a verdict, and upon argument on motion for judgment or new trial, the court has, of its own authority and without consent, so amended a plea as to make the issue correspond with that which was really tried at N. P. *Parsons v. Alexander*, 5 E. & B. 263. And in *Clough v. L. & N. W. Ry. Co.*, L. R., 7 Ex. 26, a plea was added by the Ex. Ch. setting up matters that had arisen after action, and the plaintiff was considered to have taken issue on it.

It seems that this rule does not extend to proceedings in inferior courts; *Wickes v. Grove*, 2 Jur., N. S. 212, Ex. H. T. 1856; nor to proceedings made specially amendable under other rules, *e.g.*, those relating to the joinder of parties. *Wickens v. Steel*, 2 C. B., N. S. 488; 26 L. J., C. P. 241; *Holden v. Ballantyne*, 29 L. J., Q. B. 148; *Garrard v. Giubileo*, 11 C. B., N. S. 616; 31 L. J., C. P. 131; and in 13 C. B., N. S. 832; 31 L. J., C. P. 270, Ex. Ch.

Amendment of parties at Nisi Prius.] *Vide ante*, pp. 86, *et seq.*

Withdrawing a juror.] Sometimes a juror is withdrawn, or the jury discharged, by consent, either for the convenience of the parties or at the suggestion of the judge. In such case each party pays his own costs; but, in the last-mentioned case, the action is not thereby determined. *Everett v. Youells*, 3 B. & Ad. 349. The jury may by consent, but not otherwise, be discharged from giving a verdict on certain issues. If the jury cannot agree at the close of the assizes, the judge may, in his discretion, and without consent, discharge them. *Newton's case*, 13 Q. B. 716. Counsel had at common law a general authority to withdraw a juror. *Strauss v. Francis*, L. R., 1 Q. B. 379. Now see J. Act, 1873, s. 25 (11), *post*, p. 282, and cases cited *ante*, p. 262. Where a juror has been withdrawn on terms, which the defendant afterwards refuses to carry out, such refusal does not terminate the action, and the court will grant a new trial. *Norburn v. Hilliam*, L. R., 5 C. P. 129.

Adjournment of trial.] By Rules 1883, O. xxxvi., r. 34, "the judge may if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit." The words in italics are new. At the trial of a cause copies of material documents, which had been found one day before the trial, too late for due service of notice to produce on plaintiff, were offered in evidence by defendant, and plaintiff objected to copies. Cockburn, C. J., adjourned the trial on the terms of paying the costs of the day by defendant, and resummoning the same jury. At the subsequent sitting the judge read to the jury the notes of the preceding sitting, and the trial proceeded with defendant's case. *Cahill v. Dawson*, 1 F. & F. 291. Where a material witness of plaintiff did not appear on subpoena, and the judge thought he should be examined, he adjourned the cause on condition that defendant's costs of the day should be his costs in the cause. *Bicker v. Beeston*, *per Martin*, B.; *Id.* 685. As to costs, see *Lydall v. Martinson*, 5 Ch. D. 780.

Damages.] By Rules 1883, O. xxxvi., r. 58, "where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of assessment."

Points of law.] By Rules 1883, O. xxv., r. 1, "no demurrer shall be allowed," and by rule 2, "any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause, at or after the trial." As to arguments of counsel on points of law, *vide ante*, pp. 266, 267.

Order to enter judgment.] By Rules 1883, O. xxxvi., r. 39, "the judge may at or after the trial, direct that judgment be entered for any or either party or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a court or judge."

By O. xxi., r. 17, "where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." The "balance" is that which results on the hearing of the action. *Rolfe v. Maclaren*, 3 Ch. D. 106. See also *Staples v. Young*, *post*, p. 277.

Application to stay execution.] By Rules, 1883, O. xlii., r. 17, in the case of money or costs being payable under a judgment or order, execution by *fi. fa.* or *elegit* may be issued so soon as such money or costs shall be payable, but (a) not until the period within which the judgment required

the money to be paid has expired ; and (b) "the court or judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit." The successful party is therefore, in the case of a judgment for money or costs, entitled to immediate execution ; and if the other party desire delay, he must apply that the judgment should be for payment after a limited time.

By O. xlvii., r. 2, where the judgment is to recover possession of lands, the plaintiff may "sue out a writ of possession on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed." Subject therefore to the requirements of this rule, the execution is immediate, and there seems no express power given to delay the execution ; the same end may, however, be attained by the judge postponing the entry of judgment till after the lapse of a certain time.

Order for delivery of specific chattels.] Rules, 1883, O. xlviii., r. 1, allow a judgment for the delivery of specific chattels to be enforced by a writ of delivery, which the court or a judge may order to issue. It seems that it is no longer a necessary condition that the value of the goods should have been first assessed by the jury, or by the judge if tried without a jury, as it was under the C. L. P. Act, 1854, s. 78. See *Chilton v. Carrington*, 15 C. B. 730 ; 24 L. J., C. P. 78.

Order as to costs.] By Rules, 1883, O. lxx., r. 1, "Subject to the provisions of the acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery division ; provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, matter, or issue is tried, or the court, shall for good cause otherwise order." The provisions of the Acts herein referred to are contained in the J. Act, 1873, s. 67, *post*, p. 277. This rule replaces Rules, 1875, O. lv. r. 1, under which the cases collected below were decided.

By rule 2, "when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

Rule 1, which impliedly repeals 21 Jac. 21, c. 16, s. 6, and 3 & 4 Vict. c. 24, ss. 2, 3, governs the right to costs in every case in which the plaintiff is not deprived of them by the County Courts Act, 1867, s. 5 (now amended, *vide post*, p. 276), as brought into operation by the J. Act, 1873, s. 67. *Garnett v. Bradley*, 3 Ap. Ca. 944, D. P. It would seem, however, that provisions relating to costs in statutes passed for the protection of special classes of persons, e.g. special constables (1 & 2 Will. 4, c. 41, s. 19, *post*, p. 276), are still in force. *Id.* 970, *per* Ld. Blackburn.

Where the action is tried by a judge alone, the costs are absolutely in his discretion, and neither party can get them from the other without an order. But where an action has been brought to enforce a legal right, and there has been no misconduct on his part, as to which *vide infra*, a successful plaintiff is entitled to an order for his costs under this rule. *Cooper v. Whittingham*, 15 Ch. D. 501. The defendant cannot be ordered to pay the costs of an unsuccessful plaintiff. *Dicks v. Yates*, 18 Ch. D. 76, C. A., followed in *Re Foster*, 8 Q. B. D. 515, C. A.

Where an action is tried by a jury, "good cause" for making an order

under the proviso, may appear from the conduct of the parties prior to and conducing to the litigation. *Harnett v. Vise*, 5 Ex. D. 307, C. A. And, the judge may even order a plaintiff who has recovered only a nominal sum to pay the defendant's costs. *Harris v. Petherick*, 4 Q. B. D. 611, C. A. The judge may *ex mero motu* make an order to deprive the plaintiff of costs though no application has been made to him on the part of the defendant. *Turner v. Heyland*, 4 C. P. D. 432; *Collins v. Welch*, 5 C. P. D. 27, C. A. The judge may make an order as to costs after the trial, though it would seem he must make it within a reasonable time. See *Bowey v. Bell*, *infra*.

Where no application has been made to the judge an application may be made to a divisional court to deprive a successful party of his costs; *Myers v. Defries*, *Siddons v. Lawrence*, 4 Ex. D. 176, C. A.; provided such application be made within a reasonable time; *Brooks v. Israel*, 4 Q. B. D. 95; but, not otherwise. *Bowey v. Bell*, *Id.* As the decision of the court under this order is made final by the J. Act, 1873, s. 49, the jurisdiction of the divisional court cannot be exercised by a single judge under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17. See Rules, 1883, O. lxx., r. 1 (e.).

In any case in which there is but one issue between the parties no difficulty can arise as to the meaning of the term "event," in O. lxx., r. 1. Where there are several distinct causes of action on which the plaintiff and defendant respectively succeed, the term is to be taken distributively, and the defendant is entitled to the costs of the issues found for him. *Myers v. Defries*, 5 Ex. D. 15, 180, C. A. So, where the plaintiff fails on certain issues and succeeds as to others. *Abbott v. Andrews*, 8 Q. B. D. 648. This principle is now expressly laid down by rule 2, *ante*, p. 274.

Where the defendant succeeds on a simple set-off, or, on a counter-claim founded on matters that would have been a defence prior to the J. Acts, and to an amount not less than the plaintiff's claim, he has a complete defence to the action, and is therefore entitled to his costs. See *Stooke v. Taylor*, 5 Q. B. D. 569, 576, *et seq.*, *per* Cockburn, C. J.; *Baines v. Bromley*, 6 Q. B. D. 691, 694, *per* Brett, L. J.; *Lowe v. Holme*, 10 Q. B. D. 286; *Chatfield v. Sedgwick*, 4 C. P. D. 459, C. A.

Where, however, the counter-claim is in the nature of a cross action and the plaintiff is successful on his claim, and the defendant also on his counter-claim, the plaintiff is entitled, even although the defendant recover the larger amount, to the general costs of the action; the defendant is entitled to the costs of the counter-claim, but there is no apportionment of such costs as, if the claim and counter-claim had been separate actions, would have been incurred in each of them. *Ward v. Morse*, 23 Ch. D. 377, C. A. See also *Cole v. Firth*, 4 Ex. D. 301, n.; *Stooke v. Taylor*, 5 Q. B. D. 569; and *Ellis v. De Silva*, 6 Q. B. D. 521. Where the claim and counter-claim are both dismissed with costs, the plaintiff pays the general costs of the action and the defendant the amount only by which the costs have been increased by the counter-claim. *Saner v. Bilton*, 11 Ch. D. 416; *Mason v. Brentini*, 15 Ch. D. 287, C. A.

The distinction above pointed out between set-off and counter-claim, as to which *vide post*, *Defences to Actions on Simple Contract—Set-off and Counter-claim*, was overlooked in many of the earlier cases on the subject. See judgments in *Stooke v. Taylor*, *supra*. It should be observed that the rights of the parties as to costs may be seriously affected by an incorrect entry of the judgment. See *Baines v. Bromley*, 6 Q. B. D. 691, C. A.

By Rules, 1883, O. xvi., r. 1, a defendant, though unsuccessful, shall be entitled to his costs occasioned by joining under that rule (*ante*, p. 86), any co-plaintiff who shall not be entitled to relief unless the court in disposing

of the costs of the action shall otherwise direct. See *D'Hormusgee v. Grey*, 10 Q. B. D. 13.

The stat. 1 & 2 Will. 4, c. 41, s. 19, provides that in any action brought against a special constable, &c., for anything done in pursuance of the act, the plaintiff, though successful, "shall not have costs against the defendant unless the judge before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon." It seems that this section is still in force, *vide ante*, p. 274.

Order as to costs of or occasioned by third party.] Where a third party, C., has been brought in under Rules, 1883, O. xvi., rr. 48-53, rule 54 provides that "the court or a judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, or give such direction as to costs as the justice of the case may require;" and by rule 56, a co-defendant against whom a defendant seeks contribution or indemnity is in the same position as a third party. Thus, costs have been ordered to be paid to C. by the plaintiff; *Witham v. Vane*, 28 W. R. 812, T. S. 1880, Fry, J.; or, by the defendant; *Beynon v. Godden*, 4 Ex. D. 246, 247, *cor.* Huddleston, B.; *Dawson v. Shepherd*, 49 L. J., Ex. 529, C. A.; or, C. has been allowed to bear his own costs. *Williams v. S. E. Ry. Co.*, 26 W. R. 352; H. S., 1878, Q. B. D. So again, C. has been ordered to pay to an unsuccessful defendant the costs payable by him to the plaintiff; *Hornby v. Cardwell*, 8 Q. B. D. 329, C. A.; or, to pay the plaintiff the costs occasioned by his defence. *Piller v. Roberts*, 21 Ch. D. 198. These orders were made under Rules, 1875, O. lv., r. 1, which was similar in terms to Rules, 1883, O. lxx., rule 1, *ante*, p. 274; and O. xvi., r. 54, *supra*, is explicit on the matter.

Order for costs on higher scale.] Under Rules, 1883, O. lxx., r. 8, costs are in general to be allowed on the "lower scale," given in Appendix N.; but by rule 9, the court or a judge may at the trial or hearing or further consideration of the cause or matter or at the hearing of any application therein, on special grounds arising out of the nature and importance or the difficulty or urgency of the case, order, either generally in any cause or matter, or as to the costs of any particular application made or business done therein, that the costs shall be allowed on the "higher scale." See *Norfolk, Duke of, v. Arbutnot*, 6 Q. B. D. 279; *In re Terrell*, 22 Ch. D. 473, C. A.

By rule 12, "in actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court unless the court or a judge otherwise orders." As to the construction to be placed on the word "recover," *vide post*, p. 277.

It would seem that the plaintiff is, in ordinary cases, entitled to an order under this rule, where the defendant is abroad, and could not therefore be served with county court process. *Mendelssohn v. Hoppe*, W. N. 1884, p. 31, Mathew, J. The rule applies to an action commenced before the rule came into operation where judgment is recovered afterwards. *Langley v. Sugden*, W. N. 1883, p. 198, Field, J.

Certificate for costs under the County Courts Act, 1867.] By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, as amended by 45 & 46 Vict. c. 57, s. 4, "if in any action, commenced after the passing of this act, in any of her Majesty's Superior Courts of Record, the plaintiff shall recover a sum

less than 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs."

The J. Act, 1873, s. 67, enacts that the above section "shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a county court." This limitation to causes in which relief can be given in a county court was first introduced by the above section. By sect. 89, the county court can in all causes within its jurisdiction grant relief and give effect to defence and counter-claim as fully as the High Court of Justice could have done. It has no original jurisdiction to entertain an action for malicious prosecution, libel, slander, seduction, or breach of promise of marriage; 9 & 10 Vict. c. 95, s. 58; nor, any action where the claim exceeds 50*l.*; 13 & 14 Vict. c. 61, s. 1; 19 & 20 Vict. c. 108, s. 24; except in actions founded on the equitable jurisdiction conferred on the county courts by stat. 28 & 29 Vict. c. 99, s. 1.

Money paid into court under a defence of payment into court is recovered within the meaning of the County Courts Act, 1867, s. 5; *Boulding v. Tyler*, 3 B. & S. 472; 32 L. J., Q. B. 85; *Parr v. Lillicrap*, 1 H. & C. 615; 32 L. J., Ex. 150; *Hewitt & Co. v. Cory*, L. R., 5 Q. B. 418; but, it is otherwise where the defence is tender. *James v. Vane*, 2 E. & E. 883; 29 L. J., Q. B. 169. As to cases in which the payment of money into court and the recovery at the trial are in respect of different causes of action, see *Palmer v. Garrett*, L. R., 5 C. L. 412, C. P.; *Byrne v. M'Evoy*, *Id.* 568; *Leonard v. Brownrigg*, L. R., 6 C. L. 161, Q. B., and cases there cited.

The proviso in the J. Act, 1873, s. 67, as to the action being one for matter in respect of which relief could be given in the county court, seems to refer both to the amount and nature of the claim which the plaintiff substantiates. See *Neale v. Clarke*, 4 Ex. D. 295, per Hawkins, J.; and *Chatfield v. Sedgwick*, 4 C. P. D. 461, per M. R. Thus where the plaintiff's claim was proved to be 114*l.* and the defendant's set-off to be 109*l.*, it was held, that as the county court had no jurisdiction to entertain the plaintiff's claim, he was not deprived of his costs. *Potter v. Chambers*, 4 C. P. D. 457; *Neale v. Clarke*, 4 Ex. D. 286.

Where the plaintiff proved a claim of 35*l.* for rent and damages, and the defendant a counter-claim of 20*l.* for damages, the plaintiff was held entitled to recover the costs of his claim and the defendant the costs of his counter-claim. *Stooke v. Taylor*, 5 Q. B. D. 569; not following *Staples v. Young*, 2 Ex. D. 324, where it was held that if the plaintiff proved a claim and the defendant proved a counter-claim of less amount, the plaintiff recovered the balance only. The provisions of the County Courts Act, 1867, s. 5, do not affect the right to costs of a defendant who has succeeded on a counter-claim. *Blake v. Appleyard*, 3 Ex. D. 195; *Chatfield v. Sedgwick*, 4 C. P. D. 383, 459, C. A. Hence in the same action the plaintiff, though successful, may be deprived of his costs on his claim, while the defendant recovers costs on his counter-claim. S. C.

In order to decide, for the purposes of the County Courts Act, 1867, whether an action is founded on contract or on tort, the court will now consider the substantial nature of the action alone, and not its form. Thus, an action for the detention of goods is founded on tort; *Bryant v. Herbert*, 3 C. P. D. 389, C. A.; and a claim against a common carrier for not safely carrying goods delivered to him for carriage is founded on contract. *Fleming v. Manchester Sheffield, &c., Ry. Co.*, 4 Q. B. D. 81, C. A., overruling *Tattan v. Gt. W. Ry. Co.*, 2 E. & E. 844; 29 L. J., Q. B. 184. See also *Bayli*

v. *Lintott*, L. R., 8 C. P. 345. So, an action by the consignor against the carrier for delivering the goods to the consignee, after the consignor has given a notice to stop them *in transitu*, is founded on tort. *Pontifex v. Midland Ry. Co.*, 3 Q. B. D. 23.

The under-sheriff trying a writ of inquiry can certify under sect. 5. *Craven v. Smith*, L. R., 4 Ex. 146. So may a county court judge trying an issue under 19 & 20 Vict. c. 108, s. 26; the issue is a sufficient record on which to certify. *Taylor v. Cass*, L. R., 4 C. P. 614. Where an action is referred to an arbitrator "with all the powers of certifying of a judge at Nisi Prius," he cannot certify after his award has been made. *Bedwell v. Wood*, 2 Q. B. D. 626.

It has been held that the words "commenced after the passing of this act" are parenthetical, and that sect. 5 applies therefore to an action commenced in an inferior court and removed by certiorari into the superior court, even though at the instance of the defendant. *Pellas v. Breslawer*, L. R., 6 Q. B. 438, B. C. *Sed quære*. By O. lxx., r. 12, *ante*, p. 276, a plaintiff recovering not more than 50*l.* in contract, requires a judge's order to obtain more costs than he would have been entitled to if he had sued in a county court.

The cases in which plaintiffs were deprived of costs by reason of the verdict not amounting to a sufficient sum, were formerly extended by certain obscure enactments contained in the stats. 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, which conferred admiralty jurisdiction on the county courts; see 31 & 32 Vict. c. 71, s. 9; but these are now repealed by Rules, 1883, O. lxx., r. 1. *Tennant v. Ellis*, 6 Q. B. D. 46, following *Garnett v. Bradley*, 3 Ap. Ca. 944, D. P. *ante*, p. 274.

Order to disallow unnecessary costs.] By Rules, 1883, O. lxx., r. 20, "The court or judge may, at the hearing of any cause or matter" . . . "and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence," &c., "or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing-officer to look into the same, and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence."

Order as to costs occasioned by refusal to admit.] By Rules 1883, O. xxi., r. 9, "Where the court or a judge shall be of opinion that any allegations of fact, denied or not admitted by the defence, ought to have been admitted, the court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted." We have seen, *ante*, pp. 70, 71, tit. *Admissions*, that the judge may relieve a party, called upon to admit a document or fact, under Rules 1883, O. xxxii., rr. 2, 4, from the costs occasioned by his refusal, by a certificate that his refusal was reasonable. This is to be given at the trial; but the court or a judge may at any time allow the costs of proving facts included in the notice to admit: there is no similar provision as to documents.

It seems to be reasonable to refuse to admit a document which the party called upon has no opportunity of inspecting or verifying. *Rutter v. Chapman*, 8 M. & W. 391, *per cur.*

Order as to costs of discovery.] By Rules 1883, O. xxxi., r. 25, the costs of discovery by interrogatories or otherwise are in general to be secured by a

deposit to be made (rule 26), "by the party seeking such discovery, and shall be allowed as part of his costs where and only where such discovery shall appear to the judge at the trial, or if there is no trial to the court or a judge, or shall appear to the taxing-officer to have been reasonably asked for."

Order for costs of shorthand writers' notes.] Costs of shorthand writers' notes of the trial will not be allowed on taxation, unless a special direction to that effect is given in the judgment. Applications for such directions must be made at the hearing, or before the judgment is drawn up. *De la Warr, Earl, v. Miles*, 19 Ch. D. 80, C. A.

Order for costs of proving original will.] Where an original will is produced and proved, the judge shall order by which party the costs of the production and proof shall be paid. 20 & 21 Vict. c. 77, s. 65, *ante*, p. 141.

Certificate for costs of special jury.] The stat. 6 Geo. 4, c. 50, s. 34, provides that the party who has obtained the special jury shall bear the costs thereof, and shall not on taxation be allowed the extra costs thereby caused, "unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand on the back of the record, that the same was a cause proper to be tried by a special jury."

Where this certificate is necessary, it must be applied for immediately after the verdict or nonsuit. In *Waggett v. Shaw*, 3 Camp. 316, an application on the day after the trial was considered too late. Where the certificate was verbally granted immediately and indorsed on the record, but was not signed by the judge till the costs were undergoing taxation, it was held too late. *Grace v. Chinch*, 4 Q. B. 606. As to the word "immediate," the following decisions on 3 & 4 Vict. c. 24, s. 2, where the words were "unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record," may be found useful. Under that section the judge might take a reasonable time to consider the application for a certificate. He was not bound to give it instantly at the close of the trial, nor before the adjournment of the court; *Thompson v. Gibson*, 8 M. & W. 281; *Page v. Pearce*, *Id.* 677; nor *semb. per* Ld. Abinger, C. B., *Id.*, even on the same day; the object of the legislature being only to exclude the operation of any intervening fact or discussion upon the judge's mind, and to make the certificate "the result of his impression at the time." And he might, by consent or acquiescence of the parties at the trial, certify a long time afterwards. *Jones v. Williams*, 13 M. & W. 420. See *Heden v. Atlantic R. M. S. Navigation Co.*, 2 E. & E. 671; 29 L. J., Q. B. 191. But where no application for the certificate was made till ten days after, at the next assize town, and the certificate was then made, the court set it aside as being too late. *Forsdike v. Stone*, L. R., 3 C. P. 607. And, it seems that when the judge had at the trial refused the certificate, he could not afterwards grant it. See *Folkard v. Metropolitan Ry. Co.*, L. R., 8 C. P. 470. The court above had no jurisdiction to review the discretion exercised by the judge at Nisi Prius. *Barker v. Hollier*, 8 M. & W. 513; *Richardson v. Barnes*, 4 Exch. 128.

PART II.

EVIDENCE IN PARTICULAR ACTIONS.

Effect of the Judicature Acts, 1873, 1875.

THE J. Acts, 1873, 1875, made great alterations in the practice and procedure of the courts. All the superior courts at Westminster were thereby constituted divisions of the High Court of Justice, each division having all the jurisdiction which was previously vested in each or either of the courts before they were consolidated. See *Pinney v. Hunt*, 6 Ch. D. 98. And by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 93, the jurisdiction of the London Court of Bankruptcy has been also transferred to the High Court.

By the J. Act, 1873, effect is to be given by every division to equitable estates, interests, and principles, in the same way as they were previously recognised by the courts of equity; mortgagees and assignees of choses in action may in general sue in their own names; stipulations as to time, &c., are not to be considered of the essence of a contract where they were not so in equity, and in general equity rules are to prevail. The principal provisions of the J. Act, 1873, relating to these subjects are as follows:—

Effect to be given to equitable estates and interests. Sect. 24. "In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following:—

(1.) "If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a court of equity, the said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose, properly instituted before the passing of this act."

(2.) "If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this act."

(3.) "The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff, or petitioner as such defendant shall have properly claimed by his pleading,

and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter with the same rights, in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

(4.) "The said courts respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this act."

(6.) "Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this act, the said courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom or created by any statute, in the same manner as the same would have been recognised and given effect to if this act had not passed by any of the courts whose jurisdiction is hereby transferred to the said High Court of Justice."

(7.) "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

By sect. 25, (5.) "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." See *Fairclough v. Marshall*, 4 Ex. D. 37 C. A.

Mortgagor may sue in his own name.

(6.) "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been

Assignee of chose in action may sue in his own name.

entitled to priority over the right of the assignee if this act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." See hereon *Young v. Kitchin*, 3 Ex. D. 127; *Brice v. Bannister*, 3 Q. B. D. 569, C. A.; *National Provincial Bank of England v. Harle*, 6 Q. B. D. 626.

(7.) "Stipulations in contracts as to time or otherwise, which would not, before the passing" (August 5th, 1873) "of this act, have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

Stipulations
in contracts
as to time,
&c.

See hereon *post*, p. 295.

(11.) "Generally, in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." For instances of the application of this rule, see *Bustros v. White*, and *Bullock v. Corrie*, *ante*, p. 146, and *Grant v. Holland*, 3 C. P. D. 180.

It must, however, be observed that the effect of the act is not to abolish the distinction between legal and equitable estates. *Clements v. Matthews*, 11 Q. B. D. 814, *per* Cotton, L. J.

By the J. Act, 1875, s. 10 [repealing J. Act, 1873, s. 25 (1)] "in the administration by the court of the assets of any person who may die after the commencement of this act" (1st Nov. 1875), "and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up; the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this act." The decisions on the effect of this section will be found under the several subjects to which it relates.

Rules as to
creditors and
debts prov-
able.

Rules, 1883, relating to Pleading.

It will be convenient here to give a summary of the Rules, 1883, so far as they affect pleading.

By Rules, 1883, O. xvi., rr. 1, 4, 11, *ante*, p. 86, objection on the ground of non-joinder or mis-joinder of parties is no longer a defence, and ample powers of amendment are given.

By O. xix., r. 4, "every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."

R. 5 provides that the forms given in Appendices C., D., and E. shall be used where applicable.

R. 6. "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items, if necessary, shall be stated in the pleading, provided that if the particulars be of debt expenses or damages," reference to particulars otherwise delivered shall be sufficient, if they exceed 3 folios.

R. 12. "Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had, but if the defendant so plead, he shall not plead any other defence to the same cause of action without the leave of the court or a judge." See further O. xxi., r. 19, *post*, p. 284.

R. 13. "Every allegation of fact in any pleading not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

R. 14. "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case for the plaintiff or the defendant shall be implied in his pleading."

R. 15. "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

R. 16. "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

R. 17. "It shall not be sufficient for a defendant, in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

R. 18. "Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading (if any) subsequent to reply may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted." See also O. xxvii., r. 13, *post*, p. 284.

R. 19. "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances."

R. 20. "When a contract, promise, or agreement is alleged in any plead-

ing, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds, or otherwise."

O. xxi., rr. 1, 2, 3, 5, will be found *sub tit. Defences to simple contracts, post.*

R. 4. "No denial or defence shall be necessary as to damages claimed, or their amount: but they shall be deemed to be put in issue in all cases unless expressly admitted."

R. 19. "In every case in which a party shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he shall insert in the margin of his pleading the words 'by statute, together with the year of the reign in which the act of parliament on which he relies was passed, and also the chapter and section of such act, and shall specify whether such act was public or otherwise, otherwise such defence shall be taken not to have been pleaded by virtue of any act of parliament."

By O. xix., r. 12, *ante*, p. 283, the defence of "not guilty, by statute," is retained.

R. 20. "No plea or defence shall be pleaded in abatement."

O. xxiii., r. 6. "No new assignment shall be necessary or used. But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim or by way of reply."

O. xxv., r. 2. "Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause, at or after the trial." As to arguments on points of law, *vide ante*, pp. 266, 267.

O. xxvii., r. 13. "If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

O. xxxvi., r. 58. "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment."

The Rules relating to Set-off and Counter-claim will be found *post, sub tit. Set-off and Counter-claim.*

Reference is made in appropriate parts of this work to the various sections of the J. Acts, and the Rules, 1883, affecting principles of law or the practice at Nisi Prius.

ACTIONS FOUNDED ON SIMPLE CONTRACT.

In the early editions of this work an alphabetical arrangement of particular actions, in the order of the known forms of action, was adopted for convenient reference. These forms have now become obsolete, and this arrangement has therefore been recast in the following pages, and the actions are distributed under the two heads still recognised for some purposes, namely, of actions on *contracts*, simple or by specialty, and actions for *wrongs* independent of contract. The legal reader, however, will not require to be told that a strict adherence to this, or any other distribution of the subject, is practically impossible, and he will occasionally find under one head decisions which are also applicable to another and different head.

ACTION ON SALE OF REAL PROPERTY.

Vendor against Vendee.

In an action by the vendor of real property on the purchaser's default in completing the contract, the plaintiff may be called upon by the defence to prove the contract; the performance by himself of all conditions precedent; and the defendant's default.

Proof of the Contract—Stat. of Frauds.] By the Stat. of Frauds, 29 Car. 2, c. 3, s. 4, no action shall be brought, whereby to charge any person [upon any agreement made] upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such an action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. A defence under this statute must now be pleaded specially. Rules, 1883, O. xix., r. 20, *ante*, p. 284. When it is so pleaded it will be necessary to prove a contract in writing.

The words in brackets occur in a preceding part of the clause, and seem to belong to this part also. See Sugd. V. & P., 14th ed., 123. A contract by deed seems not to be within the statute, and therefore requires no signature, *vide ante*, p. 129.

What is an interest in land within Stat. Frauds, s. 4.] A question often arises as to what is an "interest in or concerning" land, &c., within this section. Where crops sold are of grass or growing fruit, and the terms of the sale imply the grant of an interest in the land, and not of a mere easement or right of entry, then the contract is within sect. 4. *Crosby v. Wadsworth*, 6 East, 602; *Jones v. Flint*, 10 Ad. & E. 753; *Rodwell v. Phillips*, 9 M. & W. 501. But, if the crops be not natural, as grass, but industrial, as wheat, and are fit to cut when sold, the sale is not an interest in land within sect. 4, though it may be within sect. 17; and it is immaterial whether the cutting is to be by the buyer or seller. *Evans v. Roberts*, 5 B. & C. 829; *Parker v. Staniland*, 11 East, 362. Where timber is sold *as such*, to be cut by either the seller or the buyer, it has been held to be the sale of a chattel. *Smith v. Surman*, 9 B. & C. 561; *Marshall v. Green*, 1 Q. B. D. 35. See further *Washbourn v. Burrows*, 1 Exch. 115, and 1 Wms. Saund. 277 c, (f).

Where the contract relates to an interest in land, any collateral contract, such as to provide additional furniture, cannot be enforced if the agreement be not in writing. *Mechelen v. Wallace*, 7 Ad. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766. So, on an oral contract to give up a house and fixtures for a certain sum, payment of the sum agreed cannot be enforced, although the house has been given up pursuant to the agreement. *Kelly v. Webster*, 12 C. B. 283; 21 L. J., C. P. 163. But, where there was an agreement between landlord and tenant that the landlord, at the expiration of the tenancy, would take at a valuation the fixtures, which the tenant had power to remove during his term, this was held not within the statute. *Hallen v. Runder*, 1 C. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. D. 700. An agreement to take furnished lodgings is within sect. 4. *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 C. & J. 391. In those cases the contract, if carried out, would have amounted to a demise, and the occupier could have maintained trespass or ejectment; but if the contract is merely for board and lodging as an inmate of the house, although the inmate is to have a separate room,

such contract is not within sect. 4. *Wright v. Stavert*, 2 E. & E. 721; 29 L. J., Q. B. 161. Nor, it would seem, is a contract to take as lodger, and not as under-tenant, certain defined rooms within sect. 4. See *Allan v. Liverpool*, L. R., 9 Q. B. 191, 192, and other cases cited *post*, *sub. tit. Actions for Illegal Distress*. Nor is an agreement to build a house, though it implies a licence to go on the land. *Id.*, *per* Crompton, J. See also *Wells v. Kingston-upon-Hull*, L. R., 10 C. P. 402. A grant of a right to shoot over land and take away part of the game killed is within sect. 4. *Webber v. Lee*, 9 Q. B. D. 315, C. A. So is a contract to retire from a milk-walk in favour of the defendant, and to give up the premises occupied by the plaintiffs and stock to him. *Smart v. Harding*, 15 C. B. 652; 24 L. J., C. P. 76. So, on an oral agreement to give up a brickyard and bricks on it to the plaintiff at a valuation, defendant undertaking to pay to the landlord the rent then due, though plaintiff has taken possession and paid for the bricks, he cannot sue defendant for not paying the landlord: the contract and consideration being entire. *Hodgson v. Johnson*, E. B. & E. 685; 28 L. J., Q. B. 88; *Sanderson v. Graves*, L. R., 10 Ex. 234. For although the plaintiff's part of the agreement be performed, it cannot be enforced against the defendant if not in writing. *Cocking v. Ward*, 1 C. B. 858. See, however, *Pulbrook v. Laves*, 1 Q. B. D. 284. And an agreement as to land, if entirely performed on both sides, may be given in evidence, though not in writing, for a collateral purpose: thus, under an oral agreement that plaintiff should pay 37*l.* for defendant's interest in premises, defendant to return 10*l.* if plaintiff were refused a licence to use the premises as a slaughter-house, the plaintiff had possession of the premises and paid the defendant the 37*l.*; it was held that the plaintiff could recover the 10*l.* on the licence being refused. *Green v. Saddington*, 7 E. & B. 503.

A contract relating to the expenses of investigating the title to land is not within this section. *Jeakes v. White*, 6 Exch. 873. Nor, is it clear that an agreement relating to an easement on land is within it; such contract, however, if it professes to *grant* an easement, must be by deed. See Sugd. V. & P., 14th ed., 123, and *post*, *tit. Trespass to land—Defence of licence*. A share in a mine actually in work was held to be within sect. 4. *Boyce v. Green*, Batty, 608, Ir. Q. B. But in *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Ex. 53, an oral sale of shares in an unincorporated mine company in Cornwall, formed on the "cost-book" principle, was held good. *Accord. Powell v. Jessop*, 18 C. B. 336; 25 L. J., C. P. 199. These decisions are founded on the principle that a shareholder has an interest, not in the land, but in the adventure and profits thereof. If he be a co-tenant, in law or equity, of the land, the case would be different. The same principle applies to all joint-stock companies possessing land, in which, even although unincorporated, the shareholders have no direct interest in the land necessarily occupied for carrying on the business, but only a right to the profits of the business itself, as has been frequently decided under the Mortmain Act; *Myers v. Perigal*, 2 D. M. & G. 599; 22 L. J., Ch. 431; *Edwards v. Hall*, 6 D. M. & G. 74; 25 L. J., Ch. 82; *Attree v. Howe*, 9 Ch. D. 337, C. A.; and in appeal cases from the revising barristers; *Bulmer v. Norris*, 9 C. B., N. S. 19; 30 L. J., C. P. 25; *Bennett v. Blain*, 15 C. B., N. S. 578; 33 L. J., C. P. 63; *Freeman v. Gainsford*, 18 C. B., N. S. 185; 34 L. J., C. P. 95; *Robinson v. Ainge*, L. R., 4 C. P. 429. A contract by the defendant to get for the plaintiff a lease of land, in which the defendant has no interest, is within the section. *Horsey v. Graham*, L. R., 5 C. P. 9. A collateral agreement to do something not relating to land, in consideration that one of the parties shall sign a contract relating to land, is not within the section. *Morgan v. Griffith*, L. R., 6 Ex. 70; *Erskine v. Adeane*, L. R., 8 Ch. 756; *Mann v. Nunn*, 43 L. J., C. P. 241; *Angell v. Duke*, L. R., 10 Q. B. 174.

What is a sufficient note within Stat. of Frauds, s. 4.] The note or memorandum must be a memorandum of an agreement complete when the memorandum is made. *Munday v. Asprey*, 13 Ch. D. 855. It must specify the terms; for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. Sugd. V. & P. 14th ed. 134. Thus, where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected because it did not state the price to be paid for the estate; *Blagden v. Bradbear*, 12 Ves. 466; but, had the receipt referred to the conditions of sale, so as to have entitled the court to look at them for the terms, it might have been enforced as an agreement. S. C. The agreement cannot be enforced, unless both the contracting parties are named in it. *Williams v. Jordan*, 6 Ch. D. 517; *Williams v. Byrnes*, 1 Moo. P. C., N. S. 154; *Williams v. Lake*, 2 E. & E. 349; 29 L. J., Q. B. 1. Subject, terms, and names of the parties must appear. S. C. It is sufficient if the names appear by certain description; thus, where the property was described "as belonging to the late A. B.," and the sale was stated to be by direction of the executors; *Hood v. Barrington, Ltd.*, L. R., 6 Eq. 218; or, was stated to be sold "by direction of the proprietor;" *Sale v. Lambert*, L. R., 18 Eq. 1; *Rossiter v. Miller*, 3 Ap. Ca. 1124, D. P.; or, by a trustee selling under a trust for sale; *Callin v. King*, 5 Ch. D. 660; or, it appears that the sale is by a company in possession; *Commins v. Scott*, L. R., 20 Eq. 11; the confirmation of the auctioneer or vendor's solicitor "as agent for the vendors," was held to satisfy this rule. See also *Beer v. London & Paris Hotel, Ltd.* 412. But, the term "vendor" without further description is insufficient. *Potter v. Duffield*, Id. 4; *Thomas v. Brown*, 1 Q. B. D. 714.

A general description of the property sold is sufficient: as "Mr. O.'s house;" *Ogilvie v. Foljambe*, 3 Mer. 53; "the property in Cable Street." *Beakley v. Smith*, 11 Sim. 150. So, a memorandum, "The property duly sold to A. S., and deposit paid at close of sale," coupled with a receipt, "Pinxton, Mar. 29, 1880. Received of A. S. the sum of 21l. as deposit on property purchased at 420l., at the Sun Inn, Pinxton, on the above date. C. Owner," was held sufficient. *Shardlow v. Cotterell*, 20 Ch. D. 90, C. A.

It is not necessary that the names or terms should appear in any single paper. The contract may be collected from several connected papers. *Kennedy v. Lee*, 3 Meriv. 441; *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 662; *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J., Ch. 46; *Nene Valley Drainage Commrs. v. Dunkley*, 4 Ch. D. 1; *Baumann v. James*, L. R., 3 Ch. 508. So, if a letter, properly signed, does not contain the whole agreement, yet if it actually refers to a writing that does, it will be sufficient, though the latter writing is not signed; and oral evidence is admissible to identify the writing referred to. *Allen v. Bennet*, 3 Taunt. 169; see *Chinan v. Cooke*, 1 Sch. & Lef. 33, and *Smith v. Surman*, 9 B. & C. 561. Where a contract in writing exists which binds one party to the contract under the statute, any subsequent note, signed by the other, is sufficient to bind him, provided it either contains the terms, or refers to any other writing that contains them; *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Rossiter v. Miller*, *supra*; even though the subsequent note is written to request a rescission of the contract. *Coupland v. Arrowsmith*, 18 L. T., N. S. 755, July, 1868—Giff, V.-C. The connection ought to appear on the papers, and not by extrinsic oral evidence only. *Boydell v. Drummond*, 11 East, 152; 1 Smith's Lead. Ca., 8th ed. 336, 337. But, this connection need not be by express or specific description of one paper in the other. *Dart's V. & P.*, 5th ed., 226; *Long v. Millar*, 4 C. P. D. 450, C. A.; *Warner v. Willington* and other cases, cited *supra*. Where a contract is sought to be gathered from several letters, the whole of the correspondence must be considered, and although two early letters appear to constitute a complete contract, the

later ones may be referred to to show that such contract was not within the contemplation of the parties. *Hussey v. Horne Payne*, 4 Ap. Ca. 311, D. P.; *May v. Thomson*, 20 Ch. D. 705, C. A. A letter, "I agree to let to A. the stables in G. for the same rent, and subject to the same conditions that I hold them myself," accepted by writing signed by A., is not sufficient, as it does not state the duration of the term. *Bayley v. Fitzmaurice*, 8 E. & B. 664; 27 L. J., Q. B. 143; 9 H. L. C. 78. So, when it does not appear from the memorandum when the term is to begin. *Marshall v. Berridge*, 19 Ch. D. 233, C. A. There is no inference that the term begins on its date. S. C. Where the letter signed by the defendant contained terms, to some of which the plaintiff did not agree, it was held there was no agreement in writing between the parties. S. C. So, the acceptance of an offer, signed by the purchaser, must be unconditional in order to bind him; thus, where the vendors, in answer to an offer of purchase, wrote referring thereto "which offer we accept and now hand you two copies of conditions of sale," and enclosing agreement with special conditions, it was held that the acceptance was conditional only. *Crossley v. Maycock*, L. R., 18 Eq. 180; *Smith v. Webster*, 3 Ch. D. 49. Where the terms are to be settled by a third person; *Stanley v. Dondeswell*, L. R., 10 C. P. 102; or, a formal contract is to be prepared and signed by the parties; *Chinnock v. Ma. of Ely*, 4 D. J. & S. 638; *Winn v. Bull*, 7 Ch. D. 29; there is no agreement till that has been done. But, unless it clearly appear that the signature of a formal contract is a condition precedent to there being a binding bargain, the acceptance by letter will bind. *Bonnewell v. Jenkins*, 8 Ch. D. 70, C. A.; *Rositer v. Miller*, 3 Ap. Ca. 1124, D. P., reversing S. C. 5 Ch. D. 648; *Lewis v. Brass*, 3 Q. B. D. 667, C. A. Whether there is such a condition precedent is a question of construction. S. CC. And the intention to execute a formal instrument may be waived by the conduct of the parties. *Metropolitan Ry. Co. v. Brogden*, 2 Ap. Ca. 666, D. P. It seems notwithstanding the decisions in *Hudson v. Buck*, 7 Ch. D. 683; and *Hussey v. Horne Payne*, 8 Ch. D. 670, C. A.; that a term in the contract that the title is to be approved by the vendee's solicitor is not a condition, but merely implies that the title is to be investigated. S. C. 4 Ap. Ca. 312, 322, *per* Ld. Cairns, C. A letter written by the defendant to his own agent containing the terms of the agreement is sufficient to bind him. *Smith v. Watson*, Bunb. 55; *Gibson v. Holland*, L. R., 1 C. P. 1. The property, if stated generally in the writing, may be identified by extrinsic evidence. *Bleakley v. Smith*, 11 Sim. 150; *McMurray v. Spicer*, L. R., 5 Eq. 527; *Horsey v. Graham*, L. R., 5 C. P. 9.

If an offer is made to buy within a certain time, the offer may be retracted before acceptance. *Routledge v. Grant*, 4 Bing. 653; *Head v. Diggon*, 3 M. & Ry. 97. But, the offer remains open until the other party has received notice of retraction thereof. *Stevenson v. McLean*, 5 Q. B. D. 346. It is insufficient to post a letter of retraction which is not in the ordinary course of post received till after a letter accepting the offer has been posted. *Byrne v. Van Tienhoven*, 5 C. P. D. 344. Notice of sale to another person amounts to such retraction. *Dickinson v. Dodds*, 2 Ch. D. 463, C. A. If the offer be accepted, the vendor is bound from the time of posting the offer. *Potter v. Sanders*, 6 Hare, 1. So, an offer to sell, made and accepted by letter, binds both parties from the time the acceptance was posted. *Adams v. Lindsell*, 1 B. & A. 681; *Household Insurance &c. Co. v. Grant*, 4 Ex. D. 216 C. A. If the offer is refused by letter, but the refusal is withdrawn and the offer accepted in a subsequent letter, the vendor is not bound by his offer, though he had not expressly withdrawn his original offer. *Hyde v. Wrench*, 3 Beav. 334. When the offer is made by an agent of the vendor, and the acceptance is notified by letter to such agent, the principal is bound, though the agent has neglected to notify to him. *Wright v. Bigg*, 15 Beav.

592. See further as to contracts by interchange of letters, *post*, *Action for not accepting goods*.

An agreement, good under the Stat. of Frauds, can, it seems, be wholly rescinded, but cannot be varied by a subsequent oral agreement; nor, does such agreement to vary, operate by way of rescission of the original agreement, *vide ante*, p. 28.

Signature of note.] With regard to the *signing*, it has been held that a printed name is sufficient, *Saunderson v. Jackson*, 2 B. & P. 238 (decided on sect. 17), if recognised by, or brought home to, the party, as having been printed by his authority; *Schneider v. Norris*, 2 M. & S. 288; and it is immaterial in what part of the agreement the name is signed. S. C.; *Johnson v. Dodgson* 2 M. & W. 653; *Knight v. Crockford*, 1 Esp. 190; Cox's note to 1 P. Wms. 771. Thus, "A. B. agrees with J. R. B. to take the property situate, &c., for 248l.," in J. R. B.'s writing, is sufficient signature by him as vendor. *Bleakley v. Smith*, 11 Sim. 150. So, "Messrs. E. bought of A. B." in the writing of Messrs. E.'s agent, binds them. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J., Ex. 337, Ex. Ch.; and see other cases, cited *post*, *sub tit.* *Action for not accepting goods*. But, the mere drawing of an instrument with the name of the defendant put as one of the contracting parties by his agent, is not sufficient, if the instrument is evidently incomplete; as where it ends with "witness our hands," without any further signature following. *Hubert v. Treherne*, 3 M. & Gr. 743. And, the signature must be introduced so as to govern every material and operative part of the instrument. *Caton v. Caton*, L. R., 2 H. L. 127. A minute of a contract entered in accordance with the Companies Act, 1862, s. 67, and signed by the chairman, is sufficient to bind the company. *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314, C. A. A signing as witness has been held sufficient, if the party signing is cognisant of the contents of the instrument. *Welford v. Beazeley*, 3 Atk. 503; *Harding v. Orelthorn*, 1 Esp. 57; *Coles v. Trecothick*, 9 Ves. 234. But, this doctrine was doubted in *Gosbell v. Archer*, 2 Ad. & E. 500, unless the person signing as a witness be a principal, or is expressly acting as agent of the principal. Nor, is it clear that the signature of a solicitor approving of a draft agreement is sufficient to bind his client. *Thornbury v. Bevil*, 1 Y. & C., C. C. 554. See *Smith v. Webster*, 3 Ch. D. 49, C. A. But, the signature of a draft proposed contract by the principal, preceded by the word "approved," may amount to a sufficient signature. *Metropolitan Ry. Co. v. Brogden*, 2 Ap. Ca. 666, D. P. A letter from the purchaser's solicitor enclosing and referring to a draft conveyance which recites the agreement is insufficient. *Munday v. Asprey*, 13 Ch. D. 855.

Where a person cannot write, a signature by mark, if properly identified, is sufficient; and no inquiry can be made as to whether the person can write or not. *Baker v. Dening*, 8 Ad. & E. 94. Hence a signature by initials is sufficient. *In re Blevitt*, 5 P. D. 116. Sugden V. & P., 14th ed. 144; 2 Smith's L. Cases, 8th ed. 267.

The statute requires the agreement to be signed by the *party to be charged therewith*, or some other person thereunto by him lawfully authorised. It is good as against him though only signed by the party to be charged, and not by the other party. *Seton v. Slade*, 7 Ves. 275; *Laythoarp v. Bryant*, 2 N. C. 735; and the cases collected Sugd. V. & P., 14th ed. 129, (b). See also *Saunderson v. Jackson*, 2 B. & P. 238 (on sect. 17); and the important observations on this point in a note to *Sweet v. Lee*, 3 M. & Gr. 462. And, it is good although the agreement purported to be *inter partes*, and the party suing on it had orally accepted but had never signed it; *Liverpool Banking Co. v. Eccles*, 4 H. & N. 139; 28 L. J., Ex. 122; *Smith v. Neale*, 2 C. B.,

N. S. 67 ; 26 L. J., C. P. 143 ; so, a proposal in writing signed by the party to be charged and accepted orally is sufficient. *Reuss v. Picklesley*, L. R., 1 Ex. 342, Ex. Ch. Recognition of a previous signature is sufficient ; thus, where a proposal signed by A. is made to B. and altered by B., if A. assent to the alteration he will be bound, and oral evidence is admissible as to the state of the document when he gave his assent, and thereby converted the proposal into an agreement. *Stewart v. Eddowes*, L. R., 9 C. P. 311 (on sect. 17).

With regard to the person authorised by the party to sign, it is settled that such person need not be authorised in writing. *Coles v. Trecothick*, 9 Ves. 250 ; *Emmerson v. Heelis*, 2 Taunt. 38. A subsequent recognition of the authority of the agent by the principal is sufficient. *Maclean v. Dunn*, 4 Bing. 722. A telegram sent by the defendant may be sufficient ; the instructions for sending the telegram are a mandatory to the company or government officer to sign for the sender. *Godwin v. Francis*, L. R., 5 C. P. 295. The plaintiff's written order to buy land was in this case accepted by a telegram ; it was assumed that the original instructions for the telegram furnished by the defendant to the company, and the copy actually delivered by the company's servant to the plaintiff, were in evidence. *S. C.* See also *Coupland v. Arrowsmith*, 18 L. T., N. S. 755, ante, p. 287. The sender of a message is not liable for a mistake made by the telegraph clerk. *Henkel v. Pape*, L. R., 6 Ex. 7.

A sale by auction is within the Stat. of Frauds ; *Blagden v. Bradbear*, 12 Ves. 466 ; and the auctioneer is for this purpose the agent for both vendor and vendee, and his writing down the name of the highest bidder in the auctioneer's book or catalogue, is sufficient signature ; *Emmerson v. Heelis*, *supra* ; *White v. Proctor*, 4 Taunt. 209 ; but, this is not a sufficient memorandum if the conditions of sale are not attached to the book. *Kenworthy v. Schofield*, 2 B. & C. 945. If the highest bidder be agent for another, the writing of the auctioneer of the agent's name as purchaser binds the principal ; *Id.* 948, *per* Holroyd, J. ; *White v. Proctor*, *supra* ; in the latter case the principal was present though his agent bid. But, the agency ceases and does not apply to a sale by him *after* the auction. *Mews v. Carr*, 1 H. & N. 484 ; 26 L. J., Ex. 39. The agent must be a third person, and not one of the parties ; *Wright v. Dannah*, 2 Camp. 203 ; therefore, if the action is brought against the purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer is insufficient to satisfy the statute. *Farebrother v. Simmons*, 5 B. & A. 333 ; *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch. (on sect. 17). But, the signature by the auctioneer's clerk is sufficient in such action, where the clerk, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note accordingly in a book. *Bird v. Boulter*, 4 B. & Ad. 443. Apart from such mark of assent, however, the clerk has no authority to sign for the purchaser. *Peirce v. Corf*, L. R., 9 Q. B. 210, 215, *per* Blackburn, J. Where the auctioneer's clerk signed the contract, "Witness T. N.," without more ; this was held not to be a signing by an agent of the vendor, though the deposit was paid over to the vendor's attorney, who wrote a letter to vendee's attorney advising the purchase to be relinquished ; for such facts did not amount to a ratification of the agency of T. N. or of the contract, even supposing the signature as witness to be sufficient. *Gosbel v. Archer*, 2 Ad. & E. 500.

A bidding at an auction may be retracted before the hammer is down. *Payne v. Cave*, 3 T. R. 148 ; see *Routledge v. Grant*, 4 Bing. 653, 660. And it is very doubtful if the usual condition against retracting biddings could, in the case of an ordinary sale by auction, be enforced. *Sugden, V. & P.*, 14th ed. 14 ; *Jones v. Nanney*, 13 Price, 99.

When an oral contract within Stat. of Frauds can be enforced.] The courts of equity were in the habit of granting specific performance of contracts falling within the provisions of the Stat. of Frauds, s. 4, where there has been a part performance of the contract, although there is no written note or memorandum of the agreement as required by the section; see *Alderson v. Maddison*, 8 Ap. Ca. 420, 475, 476, *per* Ld. Selborne, C.; and under Cairns' Act (21 & 22 Vict. c. 27), those courts were in such cases further empowered to award damages for the breach of the contract so partially performed. By the J. Act, 1873, s. 24, *ante*, pp. 280, 281, all the Divisions of the High Court, constituted by that act, can exercise all the powers previously exercised by the Court of Chancery only. It will be convenient here briefly to point out what amounts to part performance within this rule, and the general rule is that the parties must, by reason of the act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract. *Dale v. Hamilton*, 5 Hare, 381, *per* Wigram, V.-C. Thus, the fact of the purchaser being in possession of the vendor's land without liability to an action of trespass, shows unequivocally the existence of a contract between the parties. S. C. Hence, acceptance of possession is sufficient part performance of the purchaser against his vendor; *Morphett v. Jones*, 1 Swans. 172; *Surcome v. Pinniger*, 3 D. M. & G. 571; *Ungley v. Ungley*, 5 Ch. D. 887, C. A.; and, similarly, delivery of possession by the vendor is sufficient as against his purchaser; *Buckmaster v. Harrop*, 13 Ves. 456. See also *Coles v. Pilkington*, L. R., 19 Eq. 174. So, if a tenant in possession, in pursuance of the terms of an oral agreement for a lease, pay the increased rent to be reserved by the lease; *Nunn v. Fabian*, L. R., 1 Ch. 35; or lay out money which, in the event of there being no such agreement, he could not recover back from his landlord. *Mundy v. Jolliffe*, 5 Myl. & Cr. 167. See also *Williams v. Evans*, L. R., 19 Eq. 547. In these cases the court will endeavour to find out what was the oral contract between the parties, and then to give it effect. *Mundy v. Jolliffe*, *supra*. So, where the parties have for a long time acted on the assumption of there being a contract. *Blackford v. Kirkpatrick*, 6 Beav. 232. See further the judgments in D. P. in *Alderson v. Maddison*, *infra*.

As has been often observed, however, the court will enforce, but cannot make contracts. Where, therefore, the contract is incomplete; *Thynne, Ly. v. Glengall, El.*, 2 H. L. C. 131, 158; or, its terms are uncertain; *Reynolds v. Waring*, You. 346; *Price v. Griffith*, 1 D. M. & G. 80; the court cannot decree specific performance. It must not only appear what the terms of the agreement are, but the acts of part performance must be referable to that agreement alone. *Price v. Salisbury*, 32 Beav. 446, 459; *affirm.* by L. J.J., see *Id.* 461, n. And, an act which, though done in performance of a contract, admits of explanation without supposing a contract, will not in general take the case out of the statute, *e.g.*, payment of the alleged purchase money. *Dale v. Hamilton*, *supra*. See also *Alderson v. Maddison*, 7 Q. B. D. 174, C. A.; 8 Ap. Ca. 467, D. P.; and *Humphreys v. Green*, 10 Q. B. D. 148, C. A. It may be observed that where marriage is the consideration for an oral contract, the entering into the marriage is not a part performance for the purpose of specific performance. *Caton v. Caton*, L. R., 1 Ch. 137.

The specific performance of a written agreement with a subsequent oral variation, stands on the same footing as that of an original independent agreement. See *Price v. Dyer*, 17 Ves. 356, and *Van v. Corpe*, 3 Myl. & K. 269, 277. But, a plaintiff seeking to enforce a written contract, could not generally in equity, any more than he could at law (as to which *vide ante*, p. 15, *et seq.*), on the ground of fraud, surprise, or mistake, vary its terms by oral evidence; *Price v. Dyer*, *supra*; *Townshend, Ms. of, v. Stangroom*, 6 Ves. 328;

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except, perhaps, where the fraud consists in a refusal to accede to a promised variation on the faith of which the plaintiff entered into a written agreement. *Pember v. Mathers*, 1 Bro. C. C. 52, 54; Sugd. V. & P., 14th ed. 174.

On the ground that the statute is not to be made an instrument of fraud, the courts, following the old rules of equity, will enforce the contract where the absence of a written memorandum is caused by the fraud of the other party, or where the memorandum has been fraudulently drawn up so as not to express the real intention of the parties. See note to *Pym v. Blackburn*, 3 Ves. 38.

See further on this subject Sugden's V. & P., 14th ed., pp. 150, *et seq.*; and Dart's V. & P., 4th ed., cap. xviii. s. 7.

An agent who has been employed to buy land, cannot retain the land himself and set up the absence of a written agreement between himself and his principal. *Heard v. Pilley*, L. R., 4 Ch. 548.

Performance of conditions precedent.] Where the defendant relies on the non-performance by the plaintiff of conditions precedent, he must plead the defence specially. Rules, 1883, O. xix., r. 15, *ante*, p. 283. The record, therefore, sufficiently indicates the proofs necessary at Nisi Prius. Certain conditions which were commonly found in most well-drawn conditions of sale, have by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), ss. 1 & 2, been incorporated in all contracts of sale of land made after 31st Dec., 1874, unless the contrary is stipulated; such of these provisions as are likely to be useful at Nisi Prius, will be found below.

Proof of title.] If the title of the plaintiff is put in issue, he must prove it. In the absence of stipulation to the contrary, the vendor was formerly obliged to deduce a good title commencing not later than 60 years back, but the Vendor and Purchaser Act, 1874, s. 1 (*vide supra*), has reduced this period to 40 years; in the cases, however, in which the period of 60 years was insufficient (as to which see Sugd. V. & P., 14th ed. 366, 367), earlier title than 40 years may now be required. Where abstracts of title are delivered, the refusal to complete the purchase is generally preceded by some communication between the parties, in which a specific objection has been pointed out, and the title thereby admitted to be in other respects unexceptionable. See *Laythoarp v. Bryant*, 1 N. C. 421, *per* Tindal, C. J. It is sufficient if the abstract show a good equitable title in the vendor, with power to get in the legal estate under the Trustee Act, without showing where the outstanding legal estate may be. *Cambervell dc. Building Society v. Hollnray*, 13 Ch. D. 754. The defendant may insist upon any defect, whether legal or equitable, in the title deduced. *Maberley v. Robins*, 5 Taunt. 625; *Elliot v. Edwards*, 3 B. & P. 181; *Jeakes v. White*, 6 Exch. 873; 21 L. J., Ex. 265; *Sterens v. Austen*, 3 E. & E. 685; 30 L. J., Q. B. 212. Where the contract expressly provides that a good title shall be deduced, evidence that the purchaser knew of the existence of covenants which rendered the title unmarketable is inadmissible. *Cato v. Thompson*, 9 Q. B. D. 616, C. A. It is, however, otherwise where there is no such express stipulation. See *In re Gloag & Miller's Contract*, 23 Ch. D. 320, 327, *per* Fry, J. A contract for "possession" means possession with a good title. *Tilley v. Thomas*, L. R., 3 Ch. 61. The vendor cannot require the vendee to make the title good by accepting it, and thereby avoiding a prior voluntary conveyance. *Clarke v. Willott*, L. R., 7 Ex. 313.

By the Vendor and Purchaser Act, 1874, s. 2, r. 2: "Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of parliament, or statutory declarations 20 years old at the date of the

contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions." By rule 3: "The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents." The recital in a deed 20 years old that the then vendor was seised in fee simple, is evidence thereof under rule 2, and unless disproved, dispenses with production of any earlier title. *Bolton v. L. School Board*, 7 Ch. D. 766. See also *In re Marsh and Earl Granville*, 24 Ch. D. 11.

The plaintiff is held to strict proof of his derivative title. *Crosby v. Percy*, 1 Camp. 30. In the sale of leaseholds more than 60 years old, in the absence of a condition to the contrary, the lease itself must be produced. *Frend v. Buckley*, L. R., 5 Q. B. 213, Ex. Ch. A contract for the sale of leasehold property is not satisfied by an underlease, unless the contract gives the purchaser notice that the property is held under a derivative lease. *Camberwell &c. Building Society v. Holloway*, 13 Ch. D. 754.

Unless there were a stipulation to the contrary, there was formerly, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as the title of the vendor to the lease; *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 M. & Gr. 410; and see *Stranks v. St. John*, L. R., 2 C. P. 376. But, by the Vendor and Purchaser Act, 1874, s. 2, r. 1: "Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;" and now by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 3 (1), 13 (1), on a contract to sell and assign, or to grant a lease for a term of years to be derived out of a leasehold interest, the intended assignee or lessee has not the right to call for the title to the leasehold reversion. These provisions do not affect the decision that where, on the sale of leasehold property, one of the conditions of sale was "that the vendor should not be obliged to produce the lessor's title," the vendee, having discovered *aliunde* certain defects in the lessor's title, might insist on those defects. *Shepherd v. Keatley*, 1 C. M. & R. 117. See also *Sellick v. Trevor*, and *Phillips v. Caldcleugh*, *post*, p. 294. But, where the contract contained a similar clause, and the defendant agreed to sell to the plaintiff the lease "as he held the same," it was held that the plaintiff could not raise any objection to the lessor's title. *Spratt v. Jeffery*, 10 B. & C. 249. So, where the condition was that the "lessor's title will not be shown and shall not be enquired into." *Hume v. Bentley*, 5 D. G. & S. 520; 21 L. J., Ch. 760. See also *Best v. Hamand*, 12 Ch. D. 1, C. A. It has, however, been held that, notwithstanding such a condition, the purchaser may raise any objection to the title which the vendor himself discloses. *Smith v. Robinson*, 13 Ch. D. 148. And, where the contract provided that it should form no objection to the title that the indenture was an underlease, and no requisition or inquiry should be made respecting the title, the purchaser was held to be at liberty to show *aliunde* that the lessor was mortgagor only, and had no power to grant the lease. *Waddell v. Wolfe*, L. R., 9 Q. B. 515. See also *Harnett v. Baker*, L. R., 20 Eq. 50. There is no implied contract for title on the sale of an *agreement* for a lease; for this is only a sale of the vendor's interest such as it is. *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J., Ex. 287. So, on a sale of a patent right, there is no implied warranty of valid letters patent. *Hall v. Conder*, 2 C. B., N. S. 22; 26 L. J., C. P. 138; *Smith v. Neale*, 2 C. B., N. S. 67; 26 L. J., C. P. 143.

In a sale of leaseholds, where the licence of the lessor is, by the terms of the lease, required for an assignment, the vendor must obtain the required

licence. *Winter v. Dumergue*, 14 W. R. 281, 282, M. T. 1866, C. P.; *Id.* 699, Ex. Ch. But, where land is taken by a railway company, under their parliamentary powers, the necessity for such licence is taken away by the operation of the act. *Slipper v. Tottenham, &c., Ry. Co.*, L. R., 4 Eq. 112. See also *Bailey v. De Crespigny*, L. R., 4 Q. B. 180.

If the vendor stipulate that he shall not be bound to produce title prior to the last conveyance, if he produce an earlier title bad on the face of the abstract, the vendee may reject it. *Sellick v. Trevor*, 11 M. & W. 722. So, if the vendor agree to sell a "freehold" residence, under a similar condition, and the title deed produced show that the property is encumbered with a condition or covenant, the vendee may reject it, as he bargained for an unencumbered freehold. *Phillips v. Caldecleugh*, L. R., 4 Q. B. 159.

Where the property consisted of several parcels sold by auction in distinct lots to one vendee, *Ld. Kenyon* is said to have held that the vendor, having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern. *Chambers v. Griffiths*, 1 Esp. 150. But, where several lots are knocked down to a bidder at an auction, and his name is marked against them in the catalogue, a separate contract arises on each lot. *Roots v. Dormer, Ltd.*, 4 B. & Ad. 77. See the cases collected and discussed in *Casamajor v. Stode*, 2 Myl. & K. 706, 724; and *Chambers v. Griffiths*, *supra*, cannot be maintained as an authority, except where it can be shown that there was an agreement that the purchaser was not to take any of the lots unless he should obtain them all. In *Dykes v. Blake*, 4 N. C. 463, *post*, p. 299, the vendee was allowed to repudiate two lots, bought separately, because they were made the subject of one entire contract by a written agreement signed at the auction.

An alleged delivery of an "abstract" is not satisfied by proof of a delivery of the deeds themselves. *Horne v. Wingfield*, 3 M. & Gr. 33. But, an alleged delivery of a "full and sufficient abstract of title" is satisfied by a delivery of a full abstract of all the vendor's title deeds, and of the facts deducing the title to himself or a trustee for him (known as a *perfect abstract*), though they may not constitute a good title; *Blackburn v. Smith*, 2 Exch. 783; and, if any condition refer to the delivery of the abstract, this, in any question as to time, means the delivery of a perfect abstract. S. C.; *Hobson v. Bell*, 2 Beav. 17; *Gray v. Fowler*, L. R., 8 Ex. 249, 279, Ex. Ch. It is the duty of the purchaser to apply for the abstract, as well as of the vendor to deliver it. *Guest v. Homfray*, 5 Ves. 818.

When an abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession. *Cornish v. Rowley*, 1 Selw. N. P., 13th ed. 219; *Berry v. Young*, 2 Esp. 640, n.; and the vendee may rescind the contract where the vendor can neither convey nor enforce a conveyance from other proper parties. *Forrer v. Nash*, 35 Beav. 167; *Brewer v. Broadwood*, 22 Ch. D. 105. As to the time within which the vendor must make out his title, *vide infra*. As to the vendor's right to rescind, on objection being taken to the title, *vide post*, p. 300.

Where the contract "is subject to the approval of the title by the vendee's solicitor," it cannot be enforced if he *bonâ fide* disapprove of the title. *Hudson v. Buck*, 7 Ch. D. 683. See also *Hussey v. Horne Payne*, 8 Ch. D. 670, C. A.; 4 Ap. Ca. 311, D. P.

Where, without a stipulation in the contract to that effect, the purchaser takes possession before completion with knowledge that there are defects in the title which the vendor cannot remove, the purchaser waives his right to have those defects removed or to repudiate the contract. *In re Gloag and Miller's Contract*, 23 Ch. D. 320. *Secus*, where the defects are removable by the vendor. See S. C.

Time for completion, &c., when material.] When a day is fixed for completion, unless the vendor make out a good title by that day, the purchaser was, at law, entitled to rescind the contract; *Cornish v. Rowley*, and *Berry v. Young*, *ante*, p. 294; *Noble v. Edwardes*, 5 Ch. D. 378, C. A.; even though it appeared that the purchaser was not ready to pay the purchase money. *Clarke v. King*, Ry. & M. 394. If no time is mentioned for the vendor to make out a good title, he must be allowed a reasonable time; *Samson v. Rhodes*, 6 N. C. 261; but Ld. St. Leonards [V. & P., 14th ed. 259 (l)] adds *sed quere*.

But although, at law, the time of completion was of the essence of the contract, in equity this was in general otherwise, if there were nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. *Roberts v. Berry*, 3 D. M. & G. 284, 291, *per* Turner, L. J.; *Tilley v. Thomas*, L. R., 3 Ch. 61, 67, *per* Ld. Cairns, L. J. By the J. Act, 1873, s. 25 (7), *ante*, p. 282, the rule of equity now prevails. A court of equity proceeded on the principle that, having regard to the nature of the subject, time was immaterial to the value, and was urged only by way of pretence and evasion. *Doloret v. Rothschild*, 1 Sim. & St. 590. This principle, however, does not apply where the property fluctuates in value from day to day, as in the case of foreign stock: time is then of the essence of the contract. S. C. So, in the case of a life annuity; see *Withy v. Cottle*, Turn. & R. 78. Or, of a reversion; see *Newman v. Rogers*, 4 Bro. C. C. 391; *Spurrier v. Hancock*, 4 Ves. 667; *Patrick v. Milner*, *infra*. So, where property is bought for the purpose of residence; *Tilley v. Thomas*, *supra*; or, of trade, as in the case of a grant of a mining lease; *Parker v. Frith*, 1 Sim. & St. 199, n.; or, of the sale of a public-house as a going concern; *Cowles v. Gale*, L. R., 7 Ch. 12. In this latter case the transfer of the licences is, in the absence of express stipulation, to be made under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 40, (2); and if not so made, the purchaser may rescind. See S. C., and *Claydon v. Green*, L. R., 3 C. P. 511, decided on 9 Geo. 4, c. 61, s. 11, the corresponding enactment, formerly in force, and now repealed by the later act. The Licensing Act, 1874 (37 & 38 Vict. c. 49), does not affect transfers. Time is also of the essence of the contract in equity where the vendors are a fluctuating body, and beneficially interested, as in the case of an ecclesiastical corporation. *Carter v. Ely*, *Dean of*, 7 Sim. 211. In such cases, however, if the conditions of sale provide for the possibility of delay in completion, it seems that time is not of the essence of the contract. *Patrick v. Milner*, 2 C. P. D. 342.

If either party has been guilty of delay, then, although time was not originally of the essence of the contract in equity, the other party may make it so by giving notice to complete within a reasonable time limited by such notice. *Stewart v. Smith*, 6 Hare, 222, n.; *Benson v. Lamb*, 9 Beav. 502; *Green v. Sevin*, 13 Ch. D. 599, 600, *per* Fry, J. What is a reasonable time depends on the circumstances of each case, the state of the title, &c., and it is impossible to lay down any definite rule as to what the length of the notice must be. See Sugd. V. & P., 14th ed., 268, 269; Dart, V. & P., 5th ed. 422, 423; *Crawford v. Toogood*, 13 Ch. D. 153; *Green v. Sevin*, *Id.* 589.

So, conversely, although time may have been originally of the essence of the contract, this may be waived by the conduct of the other party. Thus, it being in equity the duty of the purchaser to apply for the abstract, if he do not do so before the time agreed on for delivery thereof, the condition as to time is waived. *Guest v. Homfray*, 5 Ves. 818. So, where an abstract delivered after the time limited is received without objection, the condition is waived. *Smith v. Burnham*, 2 Anstr. 527.

If the purchaser has not made an application for the title before the

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commencement of the action, and no time is fixed for completing the contract, it is said to be sufficient if the plaintiff can show a good title in himself at the time of trial. *Thompson v. Miles*, 1 Esp. 185. And where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient if, on an action being brought by the vendor for specific performance, he make out a good title at the time of the judgment. Sugd. V. & P., 14th ed. 264.

Readiness to convey.] An averment of readiness to convey, if traversed, is negatived by proof of a defective title; for it negatives ability to convey. *De Medina v. Norman*, 9 M. & W. 820. See further on the evidence under a negative of readiness, *post*, *Action for not accepting goods*. The plaintiff is not bound to tender a conveyance where (as is usual) it is to be prepared by and at the cost of the vendee. *Wilmot v. Wilkinson*, 6 B. & C. 506. An averment of readiness at the steward's office, on a certain day, to complete the conveyance of copyhold by surrender, &c., is proved by the plaintiff's readiness to go to the office, though he omitted to do so, because the defendant had just before that day told him that he should not be ready. *Perry v. Smith*, Car. & M. 554, *per* Patteson, J. As to the right of the vendee to require separate conveyances of parcels, see *Egmont, Rl. of, v. Smith*, 6 Ch. D. 469.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 8 (1), "On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

The purchaser might at common law have refused to take a conveyance executed under a power of attorney; for it multiplies his proofs, and there is the risk of express or implied revocations. *Anon.* cited, 1 Esp. 116; *Richards v. Barton*, *Id.* 269. Under the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8, 9, a power of attorney may be made irrevocable, and under the 44 & 45 Vict. c. 41, s. 48 (1) a power of attorney may, with an affidavit of verification, be filed in the central office (*vide ante*, p. 92), and, (4) "an office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the central office." Sufficient evidence is probably equivalent to *prima facie* evidence. See *Barraclough v. Greenhough*, L. R., 2 Q. B. D. 612, Ex. Ch., cited *ante*, p. 141. There is no provision under sect. 8, *supra*, that the purchaser may provide a witness to the execution of the power, and it is very doubtful if the above sections would oblige a purchaser to accept a conveyance executed under a power. If the vendee did not attend to complete, it seems no objection that the vendor's solicitor had not a formal authority to receive the purchase money. See *Cox v. Watson*, 7 Ch. D. 196.

Claim on an account stated.] Where the contract is not in writing as required by the Stat. of Frauds, plaintiff may sometimes recover on a claim for an account stated by proving an acknowledgment of money due. *Cocking v. Ward*, 1 C. B. 858; *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43, cited *post*, *Action on account stated*.

Damages.] Where the action is brought before conveyance, the defendant having taken possession and dispensed with the execution of the conveyance, the plaintiff cannot recover the whole purchase money, but only damages; for the land continues to belong to him. *Laird v. Pim*, 7 M. & W. 474. This rule applies in the case of land compulsorily taken under the provisions of the Lands Clauses Consolidation Act, 1845. *E. London Union v.*

Metropolitan Ry. Co., L. R., 4 Ex. 309. The plaintiff may recover his bill of costs without proving that it has been paid. *Richardson v. Chasen*, 10 Q. B. 756.

The conditions of sale usually provide for the payment of a deposit by the purchaser, which is to be forfeited to the vendor, on default of the former in complying with the other conditions. Where the purchaser fails to make the agreed deposit, the vendor, on default made by the purchaser in completion, is entitled to recover the amount of the deposit. *Wallis v. Smith*, 21 Ch. D. 243. The forfeiture of the deposit does not, however, prevent the vendor from recovering general damages on the purchaser's refusal to complete. *Icely v. Grew*, 6 Nev. & M. 467; *Essex v. Daniell*, L. R., 10 C. P. 538. But, where the vendor resells the property under a usual condition of sale, and does so at a loss, he must, in suing the vendee for such loss and for the expenses, give him credit for the amount of the deposit paid. *Ockenden v. Henly*, E. B. & E. 485; 27 L. J., Q. B. 361. Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them; then the rule has been that, although it be called by the name of liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable. *Magee v. Lavell*, L. R., 9 C. P. 107, 111, 115. See also *Ex pte. Hulse*, L. R., 8 Ch. 1022; *Ex pte. Capper*, 4 Ch. D. 724. But in *Wallis v. Smith*, *supra*, the O. A. doubted if this rule applied unless one of the stipulations were for the payment of a lesser sum of money, or were of very trivial importance.

Accidental deterioration after the date of the contract is a loss which must fall on the vendee. *Robertson v. Skelton*, 12 Beav. 260; 19 L. J., Ch. 140. Hence, it seems that such loss may be claimed as part of the plaintiff's damages occasioned by the defendant's non-completion.

Defence.

By Rules, 1883, O. xix., r. 15, *ante*, p. 283, the defendant must allege in his statement of defence all facts not previously stated on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise. Rule 17, *ante*, p. 283, provides that a plaintiff shall not deny generally the allegations in the statement of the claim. See *Byrd v. Nunn*, 5 Ch. D. 781; 7 Ch. D. 284, C. A.

Denial of Contract.] By Rules, 1883, O. xix., r. 20, *ante*, p. 284, a bare denial of a contract alleged in any pleading shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether in reference to the Stat. of Frauds or otherwise. This rule requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under the statute. *Clarke v. Callow*, 46 L. J., Q. B. 53, C. A. As to when a written contract is dispensed with by part performance, *vide ante*, p. 290, *et seq.*

Fraud. Misdescription.] Fraud must be specially pleaded. Rules, 1883, O. xix., r. 15, *ante*, p. 283. See further as to fraud, *post*, *Defences to actions on simple contracts—Fraud.*

It is a defence that a misdescription has been wilfully introduced into the conditions of sale to make the land appear more valuable. *Norfolk, Dk. of, v. Worthy*, 1 Camp. 340; and see *Vernon v. Keys* 12 East, 637. The result of the decisions on this point is thus stated by Tindal, C. J., in *Flight v. Booth*, 1 N. C. 376:—"All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect

to mis-statements which stand clear of fraud, it is impossible to reconcile all the cases ; some of them laying it down that no mis-statements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only ; *Norfolk, Dk. of, v. Worthy, ante*, p. 297 ; *Wright v. Wilson, infra*, whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, 3 Camp. 284 ; *Waring v. Hoggart, Ry. & M.* 39 ; *Stewart v. Alliston*, 1 Mer. 26. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of sale, as in *Jones v. Edney, supra*, where the subject-matter was described to be a free public-house, while the lease contained a proviso that the lessee and his assigns should take all the beer from a particular brewery, in which case the misdescription was held to be fatal." *Accord. Pulsford v. Richards*, 17 Beav. 96.

Where premises were *malâ fide* described as "a substantial brick building," which were not such, and a plot of land mentioned in the particulars did not exist at all, the sale was held voidable. *Robinson v. Musgrove*, 2 M. & Rob. 92. So, where they were described as an "eligible investment ;" and they were, in fact, liable to be taken under a local public act : held that the purchaser might rescind the contract, and that the act, though public, was not notice *per se*. *Ballard v. Way*, 1 M. & W. 520. And, where the premises, including a yard, were said to be held under a term of 23 years, when, in truth, the yard, which was an essential part, was held under a yearly tenancy, the purchaser was allowed to rescind the sale, though a lease of the yard for the same term was afterwards procured by the seller, and though there was a clause in the conditions for compensation in the case of erroneous description, and a provision that the contract should not be annulled by it. *Dobell v. Hutchinson*, 3 Ad. & E. 355. Where an agreement for sale contains a clause similar to the one in the last case, the court will not decree specific performance where the acreage varies very largely from that represented. *Durham, El. of, v. Legard*, 34 Beav. 611 ; 34 L. J., Ch. 589, and cases there cited. Where an estate was represented to contain 1530 acres, when in fact it contained only 1100 acres, it was held that a condition that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds, was a mere conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the purchaser from rescinding on the ground of deficiency in acreage. *Aberaman Ironworks v. Wickens*, L. R., 4 Ch. 101. But, where it was provided by the conditions of sale, that "if any mistake should be made in the description of the premises, or if any other material error should appear in the particulars of sale, such mistake or error should not annul the sale, but a compensation should be made," the vendee was held not to be released from the contract by reason of a misdescription in the particulars of sale obvious on inspection of the premises, unless such misdescription was wilful and designed. *Wright v. Wilson*, 1 M. & Rob. 207. So, a specific performance for the purchase of a meadow, was decreed, where a visible footway went across it, of which no notice was given. *Oldfield v. Round*, 5 Ves. 508 ; see Sugd. V. & P., 14th ed. 328. Where building ground was sold, as such, without notice of a right of way reserved

across it by a lease as of another portion of it, held that the contract was voidable; and the purchaser was permitted to avoid it as to two lots separately bought at an auction, though the defect applied only to one lot; the seller having afterwards united both in a single contract of sale at an entire sum. *Dykes v. Blake*, 4 N. C. 463; *Accord. Shackleton v. Sutcliffe*, 1 De G. & Sm. 609. As to the effect of a misleading conveyancing condition, see *Broad v. Munton*, 12 Ch. D. 131, C. A.; *In re Marsh and Earl Granville*, 24 Ch. D. 11, C. A. A vendee of land described as copyhold is not compellable to accept freehold, notwithstanding a provision that errors in description should not vitiate the sale. *Ayles v. Cox*, 16 Beav. 23. See *Turquand v. Rhodes*, 37 L. J., Ch. 830. An agent employed to find a purchaser has authority to describe the property, and state any fact or circumstance relating to the value, so as to bind the vendor. *Mullens v. Miller*, 22 Ch. D. 194. See also *Brett v. Clowser*, 5 C. P. D. 376.

When more than one person is employed by the vendor to bid at a sale by auction this will be deemed a fraud. *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, M. & M. 126. And, the employment of a single puffer when the sale is "without reserve," avoided it at law. *Thornett v. Haines*, 15 M. & W. 367. And, where the sale is not advertised as "without reserve," the employment of a single puffer, unknown to the bidders, is evidence for the jury to sustain the defence of fraud. *Green v. Baverstock*, 14 C. B., N. S. 204; 32 L. J., C. P. 181. By 30 & 31 Vict. c. 48, s. 4, the rule in equity is made the same as at law; see also sects. 5 and 6, *infra*. It seems that an auctioneer who advertises a sale "without reserve," and without disclosing his principal's name, is liable to an action, if he knock down the lot to the principal's bidding after that of the plaintiff. *Varlow v. Harrison*, 1 E. & E. 309; 29 L. J., Q. B. 14, Ex. Ch. Where, however, a reference was made by name to the solicitor of the mortgagees by whose direction the sale was represented to be made, the auctioneer was held not to be liable. *Mainprice v. Westley*, 6 B. & S. 420; 34 L. J., Q. B. 229.

By 30 & 31 Vict. c. 48, s. 5, it is enacted, "that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person." By sect. 6, where the sale is declared "to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper." Where the conditions state that the sale is subject to a reserved bidding, this act renders it illegal for the vendor to employ a person to bid up to the reserved price, unless the right to do so is expressly stipulated for. *Gilliat v. Gilliat*, L. R., 9 Eq. 60.

Vendee against Vendor.

If the vendor refuse, or is unable to complete his contract, the purchaser may either sue for damages for such breach of contract; or in case he has made a deposit or paid part of the purchase money and has not taken possession, may sue to recover it back as money had and received. So, if a fraud has been practised on him by the vendor to induce him to buy, the vendee may rescind the contract, and sue for the deposit. *Thornett v. Haines*, *supra*.

In a special action on the contract by the purchaser, he must prove the contract, if denied; and by other defences he may be put to prove the performance of conditions precedent, and all other matters traversed by the

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defendant. The vendee is entitled to have a good title, *vide ante*, p. 292, but this right is lost by failure to take objections to that disclosed on the abstract within the time limited by the contract. *Rosenberg v. Cook*, 8 Q. B. D. 162, C. A. In this case the vendee was held entitled to delivery of possession, only, of the land by the vendor. When the defendant's title, as stated in the abstract, is objected to, it will not be enough to prove that the title has been deemed by conveyancers to be insufficient; the defect must be pointed out; *Camfield v. Gilbert*, 4 Esp. 221; and the plaintiff cannot, at the trial, insist upon any objection to the title, as stated therein, which he neglected to take at the time of rescinding the contract, and which might have been remedied by the vendor if taken before. *Todd v. Hoggart*, M. & M. 128, *cor. Ld.* Tenterden, C. J. The vendor may compel delivery of particulars of every matter of fact relied upon as an objection; but not of matter of law. *Roberts v. Rowlands*, 3 M. & W. 543. If no particulars have been given, and the pleadings are general, the vendee will be at liberty to prove any infraction of the conditions of sale. *Squire v. Tod*, 1 Camp. 293.

As to how long the vendor is entitled to exercise a condition to rescind the contract, on objection taken to his title, see *Gray v. Fowler*, L. R., 8 Ex. 249, Ex. Ch.

As to when the vendee is entitled to sue the vendor for not completing on the day fixed, *vide ante*, pp. 294, *et seq.*

As to action for deposit, *vide post*, p. 301. After the purchaser has recovered the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest and the expenses of investigating the title. *Farquhar v. Farley*, 7 Taunt. 592. The expenses of investigating the title cannot be recovered under a claim for money paid. *Camfield v. Gilbert*, 4 Esp. 221.

As a general rule, the vendee is bound to tender a conveyance to the vendor for execution by him. *Poole v. Hill*, 6 M. & W. 835. Yet, even when he is bound by the express terms of the contract to tender one, if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering it. *Seaward v. Willock*, 5 East, 198, 202, *per Ld.* Ellenborough; and in *Lovndes v. Bray*, Sugd. V. & P., 14th ed. 364 (b). So, where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on the plaintiff's part are unnecessary, and he may sustain an action without tendering a conveyance, or the purchase money. *Lovelock v. Franklyn*, 8 Q. B. 371. As to the vendee's right to rescind the contract on the ground of want of title in the vendor, *vide ante*, p. 294.

After the completion of the conveyance the purchaser may, if he was induced to enter into the agreement by fraud, maintain an action to set aside the agreement and recover his purchase money. *Raddy v. Williams*, 3 J. & L. 1; or, for damages, *vide post*, *Action for Deceit and Misrepresentation*. Where he was induced to enter into it by an innocent misrepresentation he may maintain an action to set it aside, and to recover his purchase money; but he cannot, in the absence of a special term in the agreement of purchase that he shall be allowed compensation, maintain an action for damages. *Vide Id.* Whether he can maintain such action on a special term in the agreement, or whether the whole agreement is merged in the conveyance, and the purchaser is thereby remitted to his rights on any covenants therein, is a question as to which there is much conflict of authority. In *Bos v. Helsham*, L. R., 2 Ex. 72; *In re Turner and Skelton*, 13 Ch. D. 130, Jessel, M. R.; and *Palmer v. Johnson*, 12 Q. B. D. 32, Smith, J., it was held that such action might be brought; whereas in *Manson v. Thacker*, 7 Ch. D. 620, Malins, V.-C., held that the action would not lie. This latter view is

in accordance with that expressed in Sugden's V. & P. 14th ed., p. 549, and Dart's V. & P. cap. xiv. ss. 5, 6, and with the decisions in *Besley v. Besley*, 9 Ch. D. 103; *Allen v. Richardson*, 13 Ch. D. 524; *Brett v. Clouser*, 5 C. P. D. 376; and *Joliffe v. Baker*, 11 Q. B. D. 255, where, however, the point did not directly arise, as the contracts contained no clause for compensation.

Claim for deposit.] To enable the purchaser to maintain an action for money had and received to recover the deposit, the contract must be disaffirmed *ab initio*. Some of the grounds upon which it may be rescinded are stated, *ante*, p. 294. As to when the purchaser is entitled to rescind the contract on the ground of non-completion of the contract on the appointed day, *vide ante*, pp. 294, 295. If the purchaser has taken possession of the premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises; as the parties cannot be put in the same situation in which they before stood. *Hunt v. Silk*, 5 East, 449. See also *In re Gloag and Miller's Contract*, 23 Ch. D. 320, cited *ante*, p. 294. His remedy is then on the contract itself. *Blackburn v. Smith*, 2 Exch. 783. If the purchaser repudiate the contract, he cannot recover the deposit, though there be no clause of forfeiture in the contract. *Ex pte. Barrell*, L. R., 10 Ch. 512. And, even if the contract be oral only, the purchaser cannot, by repudiating it, after he has obtained the abstract and sent requisitions thereon, entitle himself to recover the deposit. *Thomas v. Brown*, 1 Q. B. D. 714.

When the plaintiff seeks to recover the deposit, he must prove payment of it to the defendant. A payment to the agent of the vendor is, in law, a payment to the principal; and in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not. *Norfolk, Dk. of, v. Worthy*, 1 Camp. 337. But, if the deposit has been paid to the auctioneer, an action for it will lie against him *before* payment over to his principal, for he is in the nature of a stakeholder; *Burrough v. Skinner*, 5 Burr. 2639; or, if he has paid it over after notice of the defect in the title; *Edwards v. Hodding*, 5 Taunt. 815; and even, it should seem, *after* payment over to the principal without notice; for he ought to keep the deposit until the sale is complete, and it appears to whom it ought to be paid. *Gray v. Gutteridge*, 1 M. & Ry. 614. No notice to the auctioneer previous to the action being brought against him as stakeholder, is necessary. *Duncan v. Cafe*, 2 M. & W. 244. Interest on the deposit cannot, in general, be recovered in such action. *Lee v. Munn*, 8 Taunt. 45; *Farquhar v. Farley*, 7 Taunt. 594. But it may be given by the jury under 3 & 4 Will. 4, c. 42, s. 28, as damages, if a demand for the repayment of the money has been made with a notice that interest will be claimed; *vide post*, *Action for interest*. Where an auctioneer does not disclose the name of principal, an action will lie against himself for damages for the breach of contract. *Hanson v. Roberdeau*, Peake, 120; *Simon v. Motivos*, 3 Burr. 1921.

Damages.] Where the contract is oral the vendee can recover the deposit only, for he cannot sue upon the special contract. *Walker v. Constable*, 1 B. & P. 306. In other cases the purchaser may recover, in a special action against the vendor, the deposit with interest, and the expenses of investigating the title, searching for judgments, &c. *Hodges v. Lichfield*, *El. of*, 1 N. C. 492; *Turner v. Beaurain*, Sugd. V. & P., 14th ed., 362; *Farquhar v. Farley*, 7 Taunt. 592. And, such expenses as a solicitor's bill, may be recovered under an averment that plaintiff "had been put to great expenses, to wit, &c., in and about investigating the title," &c., although not actually paid. *Richardson v. Chasen*, 10 Q. B. 756. If the purchase money has been lying ready without any interest being made of it, and it was reason-

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able to keep it so lying, interest may be recovered as damages. *Sherry v. Oke*, 3 Dowl. 349. But, a person who has agreed to advance a sum on a mortgage, cannot recover interest on it where the negotiation falls for want of title, unless there be a special contract to pay it. *Sweetland v. Smith*, 1 Cr. & M. 585.

The purchaser cannot recover expenses incurred previously to entering into the contract; nor, the expenses of a survey of the estate made before he knows the title; nor, the expense of a conveyance drawn in anticipation; nor the extra cost of a suit for specific performance brought by the vendor; nor, losses on the re-sale of stock prepared for the farm. *Hodges v. Lichfield, El. of, ante*, p. 301. So, where the vendee filed a bill for specific performance which was dismissed in consequence of the defective title, he was not permitted to recover these costs in an action against the vendor for breach of contract. *Malden v. Fyson*, 11 Q. B. 292. Nor, can the vendee recover any expenses incurred in preparing a conveyance after the defect in title was discovered; *Pounsett v. Fuller*, 17 C. B. 660; 25 L. J., C. P. 145; or, in further fruitless negotiations. *Sikes v. Wild*, 1 B. & S. 587; 30 L. J., Q. B. 325, Ex. Ch.; 4 B. & S. 421; 32 L. J., Q. B. 375. And, where a lessee, with power to alter and improve, had an option to purchase, and after laying out money in improvements, elected to purchase, and the title proved bad, he was held entitled only to damages for the breach of contract; but, not for expense of improvements. *Worthington v. Warrington*, 8 C. B. 134. Where the defendant agreed to demise lands to the plaintiff and to deduce a good title thereto, and the plaintiff had formed a company to establish certain works on it, and the title proved to be a bad one, it was held that the plaintiff might recover the expenses of the agreement, of investigating the title and endeavouring to procure a good one and to obtain the lease; but, not the expense of raising the purchase money with interest, or of forming, establishing, and registering the company, nor the profits that would have accrued either to the company from the lease, or to the plaintiff as their solicitor, in carrying their project into effect; the latter heads of expense being either premature or speculative. *Handslip v. Padwick*, 5 Exch. 615.

The vendee is not in general entitled to recover compensation for the fancied goodness of his bargain, where the vendor is, without fraud, incapable of making a title. *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R., 7 H. L. 158. This rule is of general application, and the exception engrafted thereon by *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Exch. 850, is no longer law. S. C. The purchaser can by an action for deceit only, recover any further damages. S. C., *per* Ld. Chelmsford, *Id.* 207; *Engel v. Fitch*, L. R., 3 Q. B. 314; L. R., 4 Q. B. 659, Ex. Ch. Where, however, the sale does not go off for want of title, but by reason of the refusal of the vendor to take the necessary steps to give possession to the vendee, it seems that the plaintiff can recover damages for the loss of the bargain, the measure of damages being the difference between the contract price and the market price at the time of the breach. S. C. The price at which the estate was afterwards sold is *primâ facie* evidence of its market value. S. C.; and see *Godwin v. Francis*, L. R., 5 C. P. 295, cited *sub. tit. Action on warranty of authority, post.* Where A. agreed to let premises to B., knowing his intention to carry on a trade thereon, B. was held entitled to recover from A., for the breach of this agreement, damages for the loss of anticipated business during the time he necessarily occupied in getting other premises. *Jaques v. Millar*, 6 Ch. D. 153. As to the effect of a provision in the contract for the payment of a penalty or liquidated damages, *vide ante*, p. 297. As to what damages are recoverable under a claim for the deposit, *vide ante*, p. 301.

ACTION FOR USE AND OCCUPATION.

This action is grounded on stat. 11 Geo. 2, c. 19, s. 14, by which it is enacted that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants, in an action *on the case* for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered. But, the action of *debt* for rent on a contract for use and occupation lies at common law and not upon this statute. *Egler v. Marsden*, 5 Taunt. 25; *Gibson v. Kirk*, 1 Q. B. 850; and *per* Bramwell, B., in *Churchward v. Ford*, cited *infra*. It may be observed that since the abolition of real actions by stat. 3 & 4 Will. 4, c. 42, debt will lie for a rent-charge in fee. *Thomas v. Sylvester*, L. R., 8 Q. B. 368.

Plaintiff's title.] If the defendant has come in under the plaintiff or has acknowledged his title by the payment of rent to him or otherwise, he will not be permitted to impeach it at the trial; *Sullivan v. Stradling*, 2 Wils. 208; *Cooke v. Lozley*, 5 T. R. 4; *Phipps v. Sculthorpe*, 1 B. & A. 60; and it is not material in such case that the plaintiff should have the legal estate. *Hull v. Vaughan*, 6 Price, 157. Thus, if *cestui que trust* demises, he is the person to sue for the rent, and not the trustee, though the latter may have given notice to defendant to pay to him. *Churchward v. Ford*, 2 H. & N. 446; 26 L. J., Ex. 354. But, unless the defendant came in under the plaintiff, or had recognised his title, the plaintiff could only recover rent from the time that the legal estate vested in him. *Cobb v. Carpenter*, 2 Camp. 13, n. It seems, however, that since the J. Acts it is sufficient if the plaintiff has a right in equity to receive the rents as such. Tenants in common may join in this action on a parol yearly tenancy, if the tenant has always paid the rent to a joint agent of the plaintiffs; for this is evidence of a joint letting. *Last v. Dinn*, 28 L. J., Ex. 94. Where a party, after letting defendant into possession on an agreement for a future lease, mortgaged the premises to the plaintiff, who gave notice to the defendant of the mortgage, it was held that the plaintiff might recover in this form of action rent accruing due for a half-year subsequent to the mortgage, and during the currency of which the notice was given. *Rawson v. Eicke*, 7 Ad. & E. 451. A defendant, whose tenancy began under A., and who has since paid rent to the *cestui que trust* under A.'s will, cannot set up the want of the legal estate to an action for use and occupation by *cestui que trust*, though the fact is disclosed by the plaintiff's evidence. *Dolby v. Iles*, 11 Ad. & E. 335. The assignee of the landlord of A., who holds under a parol lease, may sue A. in this action, although there has been no recognition of tenancy or promise as between him and the assignee; at least where the grant by the assignor was "for himself and assigns." *Standen v. Christmas*, 10 Q. B. 135. There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has title; in the former case the tenant cannot, except under very special circumstances, dispute the title; in the latter he may. *Per* Bayley, J., in *Cornish v. Searell*, 8 B. & C. 475; *Rogers v. Pitcher*, 6 Taunt. 202; *Gravenor v. Woodhouse*, 1 Bing. 38; and see the cases cited *post*, *sub tit.* *Replevin—Tenancy of plaintiff*. Thus, where a tenant took premises from "A. and B., for and on behalf of the trustees of the joint estate of C. and D.;" and it appeared at the trial, on the evidence of the plaintiffs (who described themselves in the declaration

as joint trustees), that they were trustees of C. only ; it was held that the tenant was estopped from taking advantage of this variance. *Fleming v. Gooding*, 10 Bing. 549. So, where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title. *Rennie v. Robinson*, 1 Bing. 147. But, a payment on a mistaken supposition that the claimant was personal representative of the tenant's deceased landlord will not estop the tenant. *Knight v. Cox*, 18 C. B. 645. And, where land, belonging to a parish, was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease ; in an action for use and occupation by B. against A., it was held that A. was not precluded from disputing B.'s title, for that B. could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 B. & C. 433.

An estoppel must be mutual ; therefore if the landlord is not estopped, neither is the tenant. *Bac. Abr. Leases (O.)* ; *Brereton v. Evans*, Cro. Eliz. 700. Thus, where a husband and wife joined in leasing, by deed, land to the defendant, of which the husband alone was seised, it was held that in an action of debt for rent, brought by the wife after her husband's death, the defendant was not estopped from showing that the plaintiff had no interest in the land, because the wife could not be estopped by the lease. *Id.* So, where husband and wife demised land, the legal estate of which was in trustees for the wife, it was held that the husband could not, after his wife's death, distrain for the subsequent rent, as there was no estoppel. *Howe v. Scarrot*, 4 H. & N. 723 ; 28 L. J., Ex. 325. It seems, however, that since the Married Women's Property Act, 1882, the wife would in such cases be estopped.

In general, the title of the plaintiff is established by the production of a writing or agreement, which is proved in the usual manner, &c. ; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him. *Panton v. Jones*, 3 Camp. 372. Notice to produce the receipts for rent, or the notice of distress, if any, should in such cases be given by the plaintiff. Where the defendant occupied the plaintiff's land under the powers of a local act, and, upon a dispute respecting the right of the plaintiff to demand rent, a decree for payment was made in an amicable suit in Chancery, in which the defendant acquiesced for several years, it was held that he could not afterwards dispute his liability to rent in an action for use and occupation. *Allason v. Stark*, 9 Ad. & E. 255. Payment of an annual sum by defendant and his predecessors, occupiers, to the overseers of the parish for a century, as for "rent of common lands," is evidence of a rent-service and not a rent-charge, especially if the defendant has his title deeds in court and declines to produce them. *Hardon v. Hesket*, 4 H. & N. 175 ; 28 L. J., Ex. 137. See, however, *Doe d. Whittick v. Johnson*, Gow, 173, in which Holroyd, J., held that such payment is evidence only of a right to the rents, and not to the land, and that the presumption is that they were quit rents ; this case was not cited in *Hardon v. Hesket*, *supra*. If it appear from the plaintiff's witnesses that the defendant holds under a written agreement not produced, or which, when produced, cannot be read for want of a stamp, the plaintiff will not be allowed to give oral evidence of the holding. *Brewer v. Palmer*, 3 Esp. 213 ; *Ramsbottom v. Mortley*, 2 M. & S. 445. But, if the plaintiff has made out a *prima facie* case, and the defendant seeks to show that he holds under a written agreement, he must produce the instrument duly stamped, or his objection is untenable. *Fielder v. Ray*, 6 Bing. 332 ; *R. v. Padstow*, 4 B. & Ad. 208. A parol demise for all the residue of the lessor's term, it being the intention of the parties to create the relation of landlord and

tenant, will operate as a lease, so as to enable the lessor to maintain an action for use and occupation, or debt for rent. *Poultney v. Holmes*, 1 Str. 405; *Baker v. Gosling*, 1 N. C. 19; *Pollock v. Stacy*, 9 Q. B. 1033. Such demise, however, operates as an assignment. *Beardman v. Wilson*, L. R., 4 C. P. 57. Where A. lets land to B. as tenant from year to year, and B. by deed assigns his interest in the land to C., and A. assigns his reversion to D., who does not accept C. as his tenant; D. cannot sue A. for the rent, there being no privity of estate or contract between them. *Allcock v. Moorhouse*, 9 Q. B. D., 366, C. A.

A married woman may, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2), sue alone, for the use and occupation of land to the rents of which she is, under sects. 1 (1), 2, 5 of that act, separately entitled. See *post*, Part III., *Actions by married women*.

Where the estate of the lessor determined by his death or any other cause, before or on the rent day, the tenant was not, at common law, liable to pay any rent for his occupation from the last rent day to the day of such ceaser of his landlord's estate. This has been remedied by stat. 11 Geo. 2, c. 19, s. 15, extended by 4 & 5 Will. 4, c. 22, s. 1, in all cases where the lessor's estate ceases by his own death or that of another person, before or on the rent day; these sections enable the personal representatives of the lessor, or the lessor, as the case may be, to recover from the tenant a proportional part of such rent in respect of the time which elapsed since the last rent day. The Apportionment Act, 1870 (33 & 34 Vict. c. 35), seems not to affect the liability of the tenant; see sect. 4; notwithstanding the decision in *Swansea Bank v. Thomas*, 4 Ex. D. 94.

The stat. 14 & 15 Vict. c. 25, s. 1, enacts that where a lease or tenancy of any farm or lands held by a tenant at rack rent determines by the death or ceaser of the estate of any landlord, entitled for his life or for any other uncertain interest, instead of claims to emblements, the tenant shall hold the lands under the succeeding owner on the same terms and conditions as he would have held the same of the previous landlord, till the end of the current year of tenancy, and shall then quit without notice; the succeeding owner may recover and receive a proportional part of the rent reserved for the time between the ceaser of the previous landlord's estate and the tenant's quitting. As the privilege given to the tenant by this section is expressly given in lieu of his right to emblements, the section only applies to those tenancies in which the right to emblements would arise. *Haines v. Welch*, L. R., 4 C. P. 91. It applies to the tenancy of a cottage on a close containing more than an acre of land, which was partly cultivated as a garden and partly sown with corn and planted with potatoes. S. C.

Defendant's occupation.] There must be an occupation or holding actual or constructive; therefore a tenant who has agreed to take premises, but has not entered, is not liable to an action for use and occupation. *Edge v. Stafford*, 1 C. & J. 391; *Lowe v. Ross*, 5 Exch. 553; *Towne v. D'Heinrich*, 13 C. B. 892; 22 L. J., C. P. 219.

But, it is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises; and the continuance of the occupation will be presumed till the contrary appears. *Harland v. Bromley*, 1 Stark. 455; *Ward v. Mason*, 9 Price, 291. Where there has been an actual demise, a constructive occupation of the premises by the defendant during the time granted is sufficient; an occupation which he might have had, if he had not voluntarily abstained from it. *Per Gibbs, C. J., Whitehead v. Clifford*, 5 Taunt. 519; *Pinero v. Judson*, 6 Bing. 206; *Atkins v. Humphrey*, 2 C. B. 654, 659, *per* Cresswell, J. But, there does not appear to be any authority for the proposition that use and occupation can, in the absence of an actual demise, be maintained on a constructive occupation after the tenant has in

act ceased to occupy, and has offered to surrender the premises to the landlord. As to what creates an actual demise, see *Replevin—Tenancy of Plaintiff, post*. Where there has been an actual demise to the defendant, to which he has assented, he is liable in debt for rent, even before entry. See *Co. Litt.* 270 a.; *Bac. Abr. Leases (M.)*.

Where the defendant entered a house under an agreement to take it and pay a half-year's rent in advance, *Lush, J.*, held that that sum was recoverable only on a special count on the agreement. *Angell v. Randall*, 16 L. T., N. S. 498. The assignee of the reversion cannot, as it seems, maintain this action for rent in part incurred before the assignment; for there was then no occupation of the plaintiff's property by his permission. *Mortimer v. Preedy*, 3 M. & W. 602; S. C., 6 Dowl. 544. An adverse occupation by the defendant will not entitle the owner to sue in this form of action. *Tew v. Jones*, 13 M. & W. 12. Indeed, the stat. 11 Geo. 2, c. 19, contemplates the relation of landlord and tenant. Hence, where a trespasser entered on land after a mortgage of it to the plaintiff, who had never taken possession nor got a judgment in ejectment, it was held that the latter could not recover rent in this form of action. *Turner v. Cameron's Coal Co.*, 5 Exch. 932. But, a tenancy at sufferance is enough to support this action; as where a lessee under a lease from the plaintiff continues to hold adversely to him, after the expiration of it, as tenant to a stranger whose title is not shown. *Bayley v. Bradley*, 5 C. B. 396; *Helier v. Sillcor*, 19 L. J., Q. B. 295. If A. agrees to let lands to B., who permits C. to occupy them, B. may be sued by A. for use and occupation. *Bull v. Sibbs*, 8 T. R. 327; *Conolly v. Baxter*, 2 Stark. 525. So, if B. assign all his interest in the premises to D., A. may maintain an action for use and occupation against B., provided A. has never recognised D. as his tenant. *Shine v. Dillon*, 1 R., 1 C. L. 277, Ex. After an agreement between the plaintiff and defendant for a lease, the receipt by the defendant of the rents and profits, or an attornment from an under-tenant, is proof of use and occupation by the defendant. *Neal v. Swind*, 2 C. & J. 377. If the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable during such time as the under-tenant retains possession, for the lessor is entitled to receive the absolute possession at the end of the term. *Harding v. Crethorn*, 1 Esp. 57; *Ibbs v. Richardson*, 9 Ad. & E. 849; see *Levy v. Lewis*, 6 C. B., N. S. 766; 28 L. J., C. P. 304; 9 C. B., N. S. 872; 30 L. J., C. P. 141, Ex. Ch.; *Henderson v. Squire*, L. R., 4 Q. B. 170. But, it may be proved that the lessor had accepted the under-tenant as his tenant, as by his having accepted the key from the original lessee, while the under-tenant was in possession: by his acceptance of rent from him, or by some act tantamount to it. *Harding v. Crethorn, supra*, per *Ld. Kenyon*.

A tenant who has quitted in pursuance of an oral surrender to his landlord, without having given or received a notice to quit, remains liable; *Mollett v. Brayne*, 2 Camp. 104; *Matthews v. Sawell*, 8 Taunt. 270; or, after an insufficient notice to quit, although first acquiesced in by the landlord; *Johnstone v. Hudlestone*, 4 B. & C. 922; *Bessell v. Landsberg*, 7 Q. B. 638; even though the landlord, on the tenant's quitting, puts up a bill in the window for the purpose of getting another tenant for the premises. *Redpath v. Roberts*, 3 Esp. 225; *Johnstone v. Hudlestone, supra*. But, not so, if the landlord has, with the assent of the tenant, accepted another person as tenant, and he has entered, for this operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 B. & A. 119; *Nickells v. Atherstone*, 10 Q. B. 944. And, the operation of such acceptance as a surrender applies even where there was a lease under seal; *Davidson v. Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; and possession of the premises by the new tenant, and the fact of a new lease having been granted and the old

one delivered up and cancelled, is evidence of the assent of the first tenant. S. C. ; *Walker v. Richardson*, 2 M. & W. 882. If the landlord has accepted the key of the premises, this in itself is a surrender, and the acceptance of another tenant is immaterial ; *Dodd v. Acklom*, 6 M. & Gr. 672 ; so, if after refusal of the key which the tenant leaves behind, the landlord makes use of it and enters the premises and puts up a board "to let." *Phené v. Popplewell*, 12 C. B., N. S. 334 ; 31 L. J., C. P. 235 ; see *Lyon v. Reed*, 13 M. & W. 285, and the notes to *Ds. of Kingston's case*, 2 Smith's Lead. Cases, 8th ed. 884, *et seq.* "Anything which amounts to an agreement, on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the premises, amounts to a surrender by operation of law." *Phéne v. Popplewell*, *per Erle*, C. J., 12 C. B., N. S. 340 ; 31 L. J., C. P. 236. But, unless the landlord intend to resume possession, the fact that the key has been left with him, and he has tried to let the premises, does not constitute a surrender, and after he has let them there is no relation back beyond the time of letting. *Oustler v. Henderson*, 2 Q. B. D. 575. A., the tenant of a house, three cottages, and a stable and yard at an entire rent for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under-tenants. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord relet them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold. It was held that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 C. M. & R. 31 ; S. C. 4 Tyrw. 612. Where a tenant from year to year, at a rent payable half-yearly, quitted without giving notice to quit, and the landlord, before the expiration of the next half year, let the premises to another tenant ; it was held that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year when he quitted the premises to the time when the landlord relet the same to the second tenant. *Hall v. Burgess*, 5 B. & C. 332 ; and see *Walls v. Atcheson*, 3 Bing. 462. So, where rent is payable quarterly, if the tenant quits by consent in the middle of a quarter, the landlord cannot recover rent *pro rata*, either for the subsequent portion of the quarter or for that part of it during which the tenant occupied. *Whitehead v. Clifford*, 5 Taunt. 518 ; *Grimman v. Legge*, 8 B. & C. 324. Where a tenant, whose lease expired on Lady Day, paid a quarter's rent, after deducting a sum for repairs, on Midsummer Day, and was not afterwards seen on the premises, and a third person afterwards came into possession, and paid rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant. *Woodcock v. Nuth*, 8 Bing. 170. Although the premises are burnt down and remain unoccupied, the tenant still continues liable in this action for the rent subsequently accruing ; for the premises continue to be "held" by the defendant ; *Baker v. Holtzaffell*, 4 Taunt. 45 ; *Izon v. Gorton*, 5 N. C. 501 ; unless it be agreed that the liability shall cease after the fire ; in which case the lessee will be liable, in use and occupation, for a proportion of the rent during the time of actual occupation. *Packer v. Gibbins*, 1 Q. B. 421. And the fact of the premises having been insured, and the landlord having received the insurance money and not applied it to reinstating the premises, affords no equitable defence to the action. *Lofft v. Dennis*, 1 E. & E. 474 ; 28 L. J., Q. B. 168.

Under the old bankrupt acts it was held that an action for use and occupation lay against a lessee upon his agreement to pay rent during the

tenancy, notwithstanding his bankruptcy and the occupation of the assignees during part of the time for which the rent accrued. *Boot v. Wilson*, 8 East, 311. But under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 43, 44, 54, 169, the bankrupt's interest in land vests in the trustee on his appointment. Sect. 55 (1) provides that when any property acquired by the trustee consists of land of any tenure burdened with onerous covenants, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, within three months of the first appointment of a trustee, or where the property shall not have come to the knowledge of the trustee within one month after such appointment, then within two months after he first became aware thereof, by writing under his hand, disclaim such property; (2) the disclaimer operates to determine, as from its date, the rights, interests, and liabilities of the bankrupt in or in respect of the property disclaimed, and to discharge the trustee from all liability in respect thereof, as from the date when the property vested in him, but does not, except so far as is necessary for this purpose, affect the rights or liabilities of any other person. By sect. 55 (3) and Bky. R., 1883, r. 232, the disclaimer of a lease without the leave of the court is void, except in the cases enumerated in that rule. Sect. 55 (4) imposes restrictions on the power of disclaimer. Sect. 55 is cited *in extenso*, and the cases thereon collected, *post*, Part III., *sub tit. Actions against Trustees of Bankrupts*. The above sections will set at rest most of the questions which arose under the former acts, and which are discussed in the notes to *Auriol v. Mills*, 1 Smith's L. C., 6th ed.

Where a tenant, from year to year, assigned all his personal property to the defendant for the benefit of his creditors, and the defendant executed the deed and acted under it, it was held that he was liable for the rent unless he repudiated the tenancy. *White v. Hunt*, L. R., 6 Ex. 32.

Use and occupation does not lie against a husband for a half-year's rent due in respect of premises occupied for part of that time by his wife before marriage, and which continued to be occupied by her for a short time after her marriage. *Richardson v. Hall*, 1 B. & B. 50. Where one of two executors of a deceased tenant for years enters into the premises, such entry does not enure as the entry of both so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 1 C. M. & R. 172. And, when one only of two joint lessees holds over the other cannot be charged for rent. *Draper v. Crofts*, 15 M. & W. 166. But, where two persons sign an agreement to become tenants, and one enters under it, it may be presumed that he entered for both; and use and occupation against both will lie. *Glen v. Dungey*, 4 Exch. 61. Where premises were held by parol under two trustees, one of whom died, and the lessee continues to hold, the surviving trustee may sue in his own right, and not as survivor. *Wheatley v. Boyd*, 7 Exch. 20; 21 L. J., Ex. 39.

If, after the determination of a lease, the tenant holds over and pays rent, such evidence is conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time he occupies the premises. *Bishop v. Howard*, 2 B. & C. 100; and see *Bayley v. Bradley*, 5 C. B. 326, *ante*, p. 306. So, an executor of a tenant from year to year, holding on and paying rent, will hold on the terms of the former demise, and be personally liable. *Buckworth v. Simpson*, 1 C. M. & R. 834. But, where a tenant from year to year, after the expiration of his landlord's title, continued in possession for one quarter, and paid rent for that quarter to the party entitled in reversion, but quitted at the end of it, the payment is not evidence of a tenancy for more than the quarter, and the reversioner cannot sue the tenant for use and occupation beyond the quarter. *Freeman v. Jury*, M. & M. 19; *Jenner v. Clegg*, 1 M. & Rob. 213.

As to the power of a corporation to sue, and its liability to be sued for

use and occupation, *vide post*, Part. III., *Actions by and against Companies—Contracts by Corporations.*

We have seen that it is not necessary that there should be an *express* contract creating the relation of landlord and tenant between the parties : the relation may be implied. Thus, where the defendant has entered under a contract for sale which ultimately goes off, and his occupation has been a beneficial one, it seems that he may be liable in this action ; *Hearn v. Tomlin*, Peake, 191 ; but, only for the period since the putting an end to the contract ; *Howard v. Shaw*, 8 M. & W. 118 ; see *Crouch v. Tregonning*, L. R., 7 Ex. 88 ; and he is not liable for rent at all, if the sale goes off for want of title, and there is no agreement about paying for such occupation. *Winterbottom v. Ingham*, 7 Q. B. 611. And, it has been held that the defendant may rebut an implied agreement to pay for use and occupation by showing that he entered as vendee under a parol agreement, and that a payment he then made was for purchase money and not rent. *Corringan v. Woods*, 15 W. R. 318 ; H. T. 1868, Ir. Ex. But, in a case where the defendant, vendor, was under contract to sell the premises, but subsequently gained possession of them from a sub-vendee by falsely representing that the original contract was at an end, he was held liable to the sub-vendee during such possession for use and occupation, though at that time the defendant had the legal estate. *Hull v. Vaughan*, 6 Price, 157. So, where defendant took possession under an agreement that plaintiff, the landlord, should put the premises in repair, and that rent should not be payable till the completion of the repairs, and he quitted after six months in consequence of non-repair ; yet this was held evidence from which a jury might infer an agreement to pay *ad interim*, on the footing of a *quantum valebant*. *Smith v. Eldridge*, 15 C. B. 236. Where, under an agreement of purchase, the plaintiffs were to receive the rents and profits of the premises from a given day, and to pay the defendants interest on the purchase money from that day, the plaintiffs were entitled to recover the occupation value of the premises although there was no tenancy between the parties. *Metropolitan Ry. Co. v. Defries*, 2 Q. B. D. 189, 387, C. A.

This action does not lie where the defendant enters under an agreement for a lease which the plaintiff cannot grant for want of title. *Rumball v. Wright*, 1 C. & P. 589. B. entered into a building agreement with A., which settled the rent to be reserved by the leases of future houses to be built under A., and provided that certain annual rents or sums should be payable to A. in the interim. B. assigned the agreement to C. and C. to D. : held, that C. could not be sued for the reserved annual sums after his assignment to D ; for that neither B. nor C. became yearly tenants by the payments of the above sums, no estate having passed under the agreement ; and the annual sums being only collateral sums, independent of any tenancy, for which B. alone was liable on the contract. *Camden, Ms. of, v. Batterbury*, 5 C. B., N. S. 808 ; 28 L. J., C. P. 187, Ex. Ch. ; 7 C. B., N. S. 864 ; 28 L. J., C. P. 335. But, B. is liable to pay such sums though the leases to be granted exceed three years, and the agreement is not under seal. *Adams v. Hagger*, 4 Q. B. D. 480, C. A. If the plaintiff is a co-director with the defendant of a company which occupies the plaintiff's premises, he cannot sue defendant on an *implied* contract. *Chadwick v. Clarke*, 1 C. B. 700. One co-tenant, who occupies a house alone, but without excluding his co-tenants, is not therefore liable to pay rent to them ; *McMahon v. Burchell*, 2. Phill. 127 ; and one tenant of a farm, who takes all the profits, is not impliedly liable to his co-tenants for use and occupation. *Henderson v. Eason*, *Ib.* 308, and 12 Q. B. 986.

Where A. agreed by letter with B. to take a lease of B.'s iron ore for forty years at a certain rent, engaging to work the veins in a certain manner ;

it was held that this was not a mere licence, but a right constituting an hereditament within 11 Geo. 2, c. 19, s. 14, in respect of which use and occupation would lie against A., who had worked under it. *Jones v. Reynolds*, 4 Ad. & E. 805. So, this action lies against one who, under a written agreement or licence, has used a fishery; *Holford v. Pritchard*, 3 Exch. 793; or, who has exercised a right of sporting. See *Thomas v. Fredricks*, 10 Q. B. 775, and *Adams v. Clutterbuck*, 10 Q. B. D. 403, cited *post*, p. 314.

Damages.] Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages, though the lease be void by the Statute of Frauds. *De Medina v. Polson*, Holt, N. P. 47. But, where there is no express agreement as to rent, or where the terms of the agreement have been so far departed from that the stipulated rent is no just criterion of value, the value of the premises must be proved; *Tomlinson v. Day*, 2 B. & B. 680; and though a tenant, who holds over after the end of his term, is presumed to hold at the old rent, yet where a new tenant is substituted by consent under an agreement afterwards abandoned, no such inference arises, and the jury must find the real annual value. *Thetford, Mayor of, v. Tyler*, 8 Q. B. 95.

Plaintiff's title expired.] Although the defendant cannot impeach the title of the plaintiff under whom he holds (*ante*, p. 303), yet he may show that it has expired. *Holmes v. Pontin*, Peake, 99; *Gravenor v. Woodhouse*, 1 Bing. 43. So, he may show ouster of the plaintiff's title by sequestration. *Powell v. Hibbert*, 15 Q. B. 129. Where the defendant had come in under the plaintiff, it was held not competent for him to show that the plaintiff's interest had been forfeited to the lord of the manor, to whom the defendant had since paid rent upon notice and demand made, unless he has expressly renounced the plaintiff's title, and commenced a fresh holding under the new landlord. *Balls v. Westwood*, 2 Camp. 11. But, it is not necessary for the tenant to surrender or suffer eviction before he refuses to pay rent. It will be enough if he has paid it to a *bonâ fide* claimant really entitled to the premises, under whom he has made a new arrangement and commenced a fresh tenancy. *Mountney v. Collier*, 1 E. & B. 630; 22 L. J., Q. B. 124. See *post*, *Replevin*,—*Evidence on denial of tenancy*. But, a mere claim of rent is no defence at all, unless the defendant has actually given up possession, or has paid the rent to the owner of the legal estate under compulsion, so as to be able to show an eviction. *Emery v. Barnett*, 4 C. B., N. S. 473; 27 L. J., C. P. 216; *Hickman v. Machin*, 4 H. & N. 716; 28 L. J., Ex. 310; *Wilton v. Dunn*, 17 Q. B. 294; 21 L. J., Q. B. 60. As to what amounts to an eviction, *vide infra*.

Defendant's occupation determined.] As to notice to quit see *post*, *Action for recovery of possession of land by landlord*. An agreement that on the tenant's quitting the rent shall cease, and an acceptance of the key by the landlord, or a letting of the premises by him to a third person, is (as already stated, *ante*, pp. 306, 307) a sufficient defence. *Whitehead v. Clifford*, 5 Taunt. 518; *Hall v. Burgess*, 5 B. & C. 332; *Grimman v. Legge*, 8 B. & C. 324; *Walls v. Atcheson*, 3 Bing. 462. But, delivery of the keys by an agent of the defendant to a servant at the plaintiff's house, is not alone sufficient to prove an acceptance by the plaintiff. *Harland v. Bromley*, 1 Stark. 455. *Accord*, *Cannan v. Hartley*, 9 C. B. 634; 19 L. J., C. P. 323.

A tenancy from year to year is assignable by deed, and the privity of estate between the landlord and tenant is thereby severed. *Allcock v. Moorhouse*, 9 Q. B. D. 366, C. A., cited *ante*, p. 305.

Eviction.] An eviction by the landlord is a defence, as it determines the occupation. *Prentice v. Elliott*, 5 M. & W. 606. And, where the premises

are let at an entire rent, an eviction from part, if the tenant quits the residue, is a complete defence. *Smith v. Raleigh*, 3 Camp. 513. It has been said that, if the tenant continues in possession of the residue, he is liable *pro tanto* on a *quantum meruit*. *Stokes v. Cooper*, *Id.* 514, n. But, it is now settled that eviction from any part by the lessor, is a suspension of the whole rent while the eviction lasts. Co. Litt. 148 b.; 2 Wms. Saund. 204, (2); *Walker's case*, 3 Rep. 22 b.; *Reeve v. Bird*, 1 C. M. & R. 31, 36, *per* Parke, B.; *Neale v. Mackenzie*, 1 M. & W. 747, Ex. Ch.; *Morrison v. Chadwick*, 7 C. B. 266; *Upton v. Townend*, 17 C. B. 30; 25 L. J., C. P. 44. Eviction from part of the demised premises by a stranger, by title paramount, does not suspend the whole rent, but is merely a ground for its being apportioned. *Walker's case*, *supra*; 1 Wms. Saund. 204 a, (f). See also *Stevenson v. Lambard*, 2 East, 575.

A mere trespass is not an eviction; *Hodgskin v. Queenborough*, Willes, 130, n. (b); B. N. P. 177; *Newby v. Sharpe*, 8 Ch. D. 39, C. A.; nor, is a demand of rent by an elegit creditor who had no right to eject the defendant. *Poole, Mayor, &c., of, v. Whitt*, 15 M. & W. 571. But, a threat of expulsion by a person entitled to possession, and a consequent attornment to him, are equivalent to expulsion. *Semb.* S. C. So, a demand by a person lawfully entitled and a giving up possession to him may amount to eviction *Semb. Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78. An eviction of the under-tenant is an eviction of the tenant. *Burn v. Phelps*, 1 Stark. 94. But, a forcible expulsion of a man put into the plaintiff's house to keep possession for the defendant (tenant), and who was an unfit person, was held no eviction; the jury finding that the plaintiff did not intend to dispossess the defendant. *Henderson v. Mears*, 28 L. J., Q. B. 305. Where a lease of mines provided that the lessee should, jointly with the lessor, have the use of a railroad upon the demised premises, it was held that an expulsion from this railroad did not amount to an eviction, as the rent issued out of the land demised, and not out of the easement to use the railway. *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374. See further, as to what amounts to an eviction; *Dunn v. Di Nuoro*, 3 M. & Gr. 105; *Upton v. Townend*, *supra*; *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 46; *Pellatt v. Boosey*, 31 L. J., C. P. 281.

Defendant treated by plaintiff as a trespasser.] If the landlord has treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus, if he had *recovered* against him in ejectment, he could not sue, in this action, for the rent accruing *after* the date of the writ; for, by suing for the tort, he precluded himself from suing *ex contractu*. *Birch v. Wright*, 1 T. R. 378; *Bridges v. Smyth*, 5 Bing. 410. And, the mere *bringing* of an ejectment for a forfeiture will prevent the plaintiff from suing for rent subsequently due; for this determines the lease. *Jones v. Carter*, 15 M. & W. 718; *Grimwood v. Moss*, L. R., 7 C. P. 360; and see *Toleman v. Portbury*, L. R., 7 Q. B. 344, Ex. Ch., and *Dendy v. Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220.

No beneficial occupation.] In the case of a ready-furnished house there is an implied condition that it shall be reasonably fit for occupation when the tenancy is to begin; and if the house be then uninhabitable by reason of its being infested with vermin; *Smith v. Marrable*, 11 M. & W. 5; *Campbell v. Wenlock, Ltd.*, 4 F. & F. 716; or of defective drainage; *Wilson v. Finch Hatton*, 2 Ex. D. 336; the tenant may give up occupation, and then ceases to be liable to pay rent. The principle of these cases has not been extended to the case of an unfurnished house. *Hart v. Windsor*, 12 M. & W. 68, 86; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507. And, the tenant

is, notwithstanding the destruction of the house demised, liable to pay the rent reserved. *S. C.*; *Baker v. Holtzaffell*, 4 Taunt. 45. Non-compliance of the landlord with a covenant to do repairs, whereby the premises have become unfit for profitable occupation, and that the defendant has quitted them on that account, is no defence. *Surplice v. Farnsworth*, 7 M. & Gr. 576; *Sutton v. Temple*, 12 M. & W. 52; and some reported *Nisi Prius* cases *contra*, are not law.

Payment.] By 4 Anne, c. 16, s. 10, payment of rent by the defendant to his lessor, before he had notice of an assignment of the premises by him to the plaintiff, is a good defence. *Cook v. Moylan*, 1 Exch. 67-71. But, payment in advance to the lessor before the rent day affords no defence at law, as against the assignee, if the defendant had notice of the assignment before the rent day. *De Nicholls v. Saunders*, L. R., 5 C. P. 589. See *Chun's case*, 10 Rep. 127; *Cromwell, Ltd., v. Andrews*, Cro. Eliz. 15. If he had not notice before the rent day, the advance then becomes payment. *Cook v. Guerra*, L. R., 7 C. P. 132. As to what amounts to notice, *vide S. C.* Payment of property tax by the tenant, which the landlord is bound to allow him, under 5 & 6 Vict. c. 35, Sched. A., No. IV., Rule 9; 16 & 17 Vict. c. 34, s. 40; 27 & 28 Vict. c. 18, s. 15; and 46 & 47 Vict. c. 10, Part II., is, in effect, payment by the tenant of so much of the next rent due by him. See *Denby v. Moore*, 1 B. & A. 123, 129, 130. It would, however, now seem necessary to plead the defence specially, as it would otherwise be likely to take the plaintiff by surprise. Rules 1883, O. xix., r. 15. The tax must be deducted from the next payment of rent thereafter to be made by the tenant, and if the tenant do not so deduct the tax, he cannot afterwards sue the landlord for it as money paid. *Denby v. Moore, supra*; *Cumming v. Bedfordrough*, 15 M. & W. 438. But, the tenant can enforce an agreement by the landlord to repay him the tax, if he pay the rent in full. *Lamb v. Brewster*, 4 Q. B. D. 220, 607, C. A. These statutes only allow the tenant to deduct the tax payable on the rent reserved, and not on the full improved value of the premises. *Watson v. Horne*, 7 B. & C. 286; *Smith v. Humble*, 15 C. B., N. S. 321. The tax cannot be deducted unless it has been paid by the tenant; see *Pocock v. Eustace*, 2 Camp. 181; *Ryan v. Thompson*, L. R. 3 C. P. 144, cited *post*, *Action for illegal distress—Defence*. The tenant may also, by way of payment, show payment of rates which he may deduct from his rent under statutes allowing such deduction to be made, *e.g.*, 32 & 33 Vict. c. 41, s. 1; the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 214; the Rating Act, 1874 (37 & 38 Vict. c. 54), ss. 5, 6, 8, 9. See on this last cited Act, *Chaloner v. Bolckow*, 3 Ap. Ca. 933, D. P. With regard to payment of an amount equivalent to the rent to the superior landlord, under compulsion or threat of distress, or payment of any other charge on the land, see *post*, *Replevin—Denial of rent being in arrear*.

Statute of Limitations.] The Statute of Limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy can be inferred; though no notice to quit has been given. *Leigh v. Thornton*, 1 B. & A. 625.

Illegality.] It is a good defence that the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose; *Crisp v. Churchill*, cited 1 B. & P. 340; or, for the delivery of blasphemous lectures; see *Cowan v. Milbourn*, L. R., 2 Ex. 230; or, the occupation knowingly allowed to continue for such purposes. *Jennings v. Throgmorton*, Ry. & M. 251. Where a lessee assigned the lease, knowing the house was to be continued to be used as a brothel, it was held he could not enforce the covenant

of indemnity against the assignee. *Smith v. White*, L. R., 1 Eq. 626. But, it is no defence that plaintiff knowingly let the land to defendant for the use of a company not licensed to hold land, of which defendant was a promoter. *Job v. Lamb*, 11 Exch. 539; 25 L. J., Ex. 87.

Distress.] It seems to be no defence that the landlord has distrained goods to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a rate, the tenant's remedy is by action on the case. *Efford v. Burgess*, 1 M. & Rob. 23, *per* Parke, B. But, so long as the landlord retains the distress, though insufficient in amount, he cannot maintain the action. *Lehain v. Philpott*, L. R., 10 Ex. 242. It is no defence that the tenant quitted, without giving notice, in the fear of a distress by the superior landlord. *Rickett v. Tullick*, 6 C. & P. 66.

ACTION FOR WASTE, BAD HUSBANDRY, ETC.

This action lies on a contract not under seal, express or implied, and is in some cases founded on wrong, independent of contract, arising out of the relation of landlord and tenant. It may in some cases be maintained by a married woman alone, *vide ante*, p. 305.

Claims under the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), are in case of difference settled by a reference: see sect. 8.

The Demise. Statute of Frauds.] By the Stat. of Frauds (29 Car. 2, c. 3), s. 1, all leases and terms, whether freehold or for years, not in writing and signed by the party making them, or their agents authorised by writing, shall have the effect of leases at will only, except (sect. 2) leases not exceeding three years from the making thereof, whereon the reserved rent is equal to two-thirds of the improved value. These sections apply only to leases whereby a rent is reserved. *Crosby v. Wadsworth*, 6 East, 602.

Sect. 4 of the same statute is stated *ante*, p. 284, and applies to contracts for creating a tenancy as well as to sales; but, although sect. 2 excepts leases for three years at rack rent out of sect. 4, as well as out of sect. 1; *Bolton, Ltd.*, v. *Tomlin*, 5 Ad. & E. 856; yet agreements for such leases are not so excepted; *Edge v. Stafford*, 1 Cr. & J. 391; and, though the leases are valid, and any remedy on them in their character of leases may be resorted to, yet they do not confer the right to sue the lessee for damages for not taking possession. S. C. It seems, however, that the lessee might have been sued in debt for the rent reserved, for, where there has been an actual demise, debt lies before entry; *vide ante*, p. 306. An oral lease valid under sects. 1, 2, may be as special in its terms as a written one. *Bolton, Ltd.*, v. *Tomlin*, *supra*.

The three years must be from the *making*, and not from the *commencement* only. *Baker v. Reynolds*, Hill MSS., 2 Selw. N. P., 13th ed. 759. An oral lease for two years, with an option to the lessee to continue the holding beyond three years from the making of the lease, is severable, and is good as to the two years. *Hand v. Hall*, 2 Ex. D. 355, C. A., reversing S. C., *Id.* 318. Special terms, not necessarily implied in a tenancy, may yet be incorporated with an oral demise by implication. Thus, where an oral lease is bad for want of proper formalities required by sect. 1, yet if the lessee enters and pays rent, he becomes tenant from year to year on such of the

terms of the invalid lease as are not inconsistent with such a tenancy ; *Doe d. Rigge v. Bell*, 5 T. R. 471 ; *Richardson v. Gifford*, 1 Ad. & E. 52 ; and see *Martin v. Smith*, *post*, p. 316 ; but, upon entry under an oral lease for more than three years, the lessee is strict tenant at will, and only becomes a yearly tenant on payment of any rent. *Berrey v. Lindley*, 3 M. & Gr. 512 ; 2 Smith's L. C., notes to *Doe d. Rigge v. Bell*, and *Clayton v. Blakey*. The act 8 & 9 Vict. c. 106, s. 3, now requires a deed wherever the Statute of Frauds required a writing, otherwise the lease is void at law. It is however good as an agreement. See on this statute, *post*, *tit. Action for recovery of possession of land by landlord—Lease*. In order to show an implied promise to hold on the terms of a former lease, the old lease must be produced (unless admitted) duly stamped. *Walliss v. Broadbent*, 4 Ad. & E. 877 ; *ante*, p. 209. By Rules, 1883, O. xix., r. 20 (*ante*, p. 284), any objection on the ground of insufficiency in law of the contract must be specially pleaded.

Where lands are held of a corporation under a parol demise, a yearly tenancy is created upon payment of rent. *Wood v. Tate*, 2 N. R. 247 ; *Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162.

Where the defendant has enjoyed an incorporeal hereditament under an agreement, void as a grant because not under seal, for the whole period named therein, he is bound by the terms of the agreement ; *Thomas v. Fredericks*, 10 Q. B. 775 ; *Adams v. Clutterbuck*, 10 Q. B. D. 403 ; but, not if he has entered only. *Bird v. Higginson*, 6 Ad. & E. 824, Ex. Ch.

Waste.] By the common law an action for waste lay only against the tenant by the curtesy, tenant in dower or guardian, for these estates were created by law. The tenants for life or years, having obtained their estates by grant, were not punishable for waste until the stat. of Marlbridge (52 Hen. 3), c. 24, which gave an action for damages against the lessee for life or years or *pur autre vie*. 2 Inst. 144, 148. Subsequently the stat. of Gloucester (6 Edw. 1), c. 5, gave the additional remedy against them of the writ of waste, to recover the land wasted, as well as damages for the waste. 2 Inst. 300, 301. The ordinary remedy for waste has for a long while been by an action on the case in the nature of waste ; and now by 3 & 4 Will. 4, c. 27, s. 36, the writ of waste is itself abolished, and consequently that action is now the only remedy. 2 Wms. Saund. 252, *et seq.* (7).

The general rule as to waste at common law is that, in order to constitute it, there must be a diminution of value of the estate by it ; or an increased burden upon it ; or an impairing of the evidence of title. *Per Patteson, J.*, in *Huntley v. Russell*, 13 Q. B. 572. It is not waste for a tenant to dig gravel from pits, or work mines already open on the land when leased, if they are not excepted. Co. Lit. 546 ; Fac. Abr. Waste (C. 3). Nor, to work quarries which have been worked by the owners of the inheritance for the purpose of making a profit. *Elias v. Griffith*, 8 Ch. D. 521, C. A., affirm. *sub nom. Elias v. Snowden Slate Quarries Co.*, 4 Ap. Ca. 454, D. P. In this case Ld. Selborne was of opinion that working for use would be sufficient. *Id.* p. 465. But, where gravel pits are opened by surveyors of highways under the highway acts, the tenant cannot continue to work and sell gravel for his own profit. *Huntley v. Russell*, *supra* (case of rector for dilapidations by predecessor). If anything is done to destroy the evidence of title, an action is maintainable by the landlord against his tenant. Thus, if the tenant open a new door, the landlord may recover against him in this action pending the lease, though the house itself may not be the worse for it, provided the jury find that his reversionary interest is injured ; for the mere alteration of the property may tend to the injury of the owner. *Young v. Spencer*, 10 B. & C. 145, 152. It is observable that an act of the nature here referred to seems to be actionable without regard to its effect on

the evidence of title; for the alteration cannot be made without destroying at least some part of the freehold, which no tenant has a right to do, even although compensating improvement may in other respects result from it. In this latter case, however, the waste was known in equity as "meliorating waste," and an injunction will not be granted to restrain it. *Doherty v. Allman*, 3 Ap. Ca. 709, D. P. The erection of buildings on the land demised is not waste unless the building is an injury to the inheritance. *Jones v. Chappell*, L. R., 20 Eq. 539. The tenant is bound during the term to keep distinctly marked the boundaries between the demised land and his own land adjoining. *Spike v. Harding*, 7 Ch. D. 871.

A tenant at will is not liable for permissive waste. *Harnett v. Maitland*, 16 M. & W. 257. But, tenants for years are liable for permissive, as well as for voluntary waste. See S. C. and *Yellowly v. Gower*, 11 Exch. 274, 293, 294; 24 L. J., Ex. 289, 298; in which cases some earlier decisions are explained or overruled. See also Litt. s. 67; Co. Litt. 53 a.; 2 Inst. 299; and 1 Wms. Saund. 323 d (x), and *Woodhouse v. Walker*, 5 Q. B. D. 404.

An action for waste will lie by the lessor although the waste amounts also to a breach of covenant in the lease for which he might sue; *Kinlyside v. Thornton*, 2 Wm. Bl. 1112; *Marker v. Kenrick*, 13 C. B. 188; 22 L. J., C. P. 129; but the acts for which the action is brought must be waste *per se* and not mere breach of covenant. *Jones v. Hill*, 7 Taunt. 392. And, the covenants may restrict the liability for acts that would otherwise be waste. *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; *Yellowly v. Gower*, 11 Exch. 274; 24 L. J., Ex. 289. Where the destruction of a building demised is caused by its user in an apparently reasonable and proper manner, having regard to its character and the purposes for which it was intended to be used, this is not waste. *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507.

The right of a remainderman to sue tenant for life for waste arises when the waste is committed, and the Statute of Limitations then begins to run. *Higginbotham v. Hawkins*, L. R., 7 Ch. 676. As to right to trees as between tenant for life and remainderman, see *Honywood v. Honywood*, L. R., 18 Eq. 306.

In an action of waste the defendant is entitled to the verdict unless the damages are substantial. *Doherty v. Allman*, 3 Ap. Ca. 709, 733, per Ld. Blackburn, citing *Harrow School, Governors of, v. Alderton*, 2 B. & P. 86, per Ld. Eldon.

By 14 & 15 Vict. c. 25, s. 3, the tenant of a farm who shall erect any buildings on the farm for agricultural or trade purposes by written consent of his landlord, will be at liberty to remove them if the lessor shall not buy them within a month after notice of removal, at a valuation fixed by referees. See further the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), ss. 34, 54, 55.

Where a lease provides that at the expiration of the tenancy all damages done by the tenant should "be made good or paid for by the tenant, the amount of such payment if in dispute to be referred to and settled by two valuers," the settlement of the amount of the payment is a condition precedent to an action in respect of dilapidations. *Babbage v. Coulburn*, 9 Q. B. D. 235. It is otherwise where there is also an independent contract to pay fair compensation. *Dawson v. Fitzgerald*, 1 Ex. D. 257, C. A.

Non-repairs] The obligation to repair implied in a tenancy for years, in the absence of express stipulation, is not well defined. A tenant from year to year is only bound to keep the premises wind and water tight, and to use them in a "tenantlike" or "husbandlike" manner. *Ferguson v. —*, 2 Esp. 590; *Horsfall v. Mather*, Holt, N. P. 7; *Auworth v. Johnson*, 5 C. &

P. 239; *Leach v. Thomas*, 7 C. & P. 327. As to the tenant's liability when the non-repair amounts to waste, *vide ante*, p. 315.

If the tenant holds over after a lease with a repairing covenant, he presumably continues liable for the same repairs, so far as they are consistent with a yearly tenancy; *Digby v. Atkinson*, 4 Camp. 275; *Beale v. Sanders*, 3 N. C. 850; *Arden v. Sullivan*, 14 Q. B. 832; *Ecclesiastical Commrs. v. Merral*, L. R., 4 Ex. 162; unless altered circumstances rebut the presumption. *Johnson v. St. Peter, Hereford*, 4 Ad. & E. 520. Where a tenant enters under a lease for 7 years, not under seal, and thereby agrees to do certain repairs in the 7th year of the term, and he occupies and pays rent during the whole term, he is bound to do the repairs. *Martin v. Smith*, L. R., 9 Ex. 50.

An express contract to repair supersedes implied obligations of the like nature. *Standen v. Christmas*, 10 Q. B. 135. The law with regard to the obligation to repair under such a covenant, is stated under tit. *Action on covenant to repair, post*.

There is no implied obligation of the landlord to do substantial repairs though the premises be in a dangerous state. *Gott v. Gandy*, 2 E. & B. 845; 23 L. J., Q. B. 1. Nor, to inform a proposed tenant of their state. *Keates v. Cadogan*, *El. of*, 10 C. B. 591; 20 L. J., C. P. 76. As to how far it might be an answer to an action on the lessee's covenant to repair, see *Colebeck v. Girdlers Co.*, 1 Q. B. 234.

Good Husbandry—Custom.] The obligation to good husbandry arises either by contract, or the mere relation of tenant, or from local custom, or other circumstances. The custom is not necessarily excluded by proof of express agreement, if the two be consistent. *Hutton v. Warren*, 1 M. & W. 466. But, a custom that an outgoing tenant should leave the manure, being paid for it, is excluded by an express stipulation that he should leave it without any mention of payment. *Roberts v. Barker*, 1 Cr. & M. 808. A tenant who holds over after a lease has expired, or enters under an agreement for a lease, holds subject to the terms of the lease as to the course of husbandry. *S. C.*; *Doe d. Thomson v. Amey*, 12 Ad. & E. 476. See also the cases cited, *supra*. But, if after holding over and paying rent, he by deed assigns his interest to a third person, the assignee does not, until his tenancy has been recognised by the lessor, hold on the terms of the original lease. *Elliott v. Johnson*, L. R., 2 Q. B. 120. In this case there was a clause in the lease against assignment, but the majority of the court rested their judgment on the ground that the doctrine of conditions running with the land is confined to covenants annexed to the land by indenture of demise, and a mere assignment of a parol tenancy does not pass to the assignees the right to enforce collateral stipulations. *Id.* 124, 127.

Though it is generally treated as a custom for the incoming tenant to pay the value of fallows, &c., to the outgoing tenant, yet when there is no incoming tenant, the contract implied by the custom is that the landlord shall pay the value. *Faviell v. Gaskoin*, 7 Exch. 273; 21 L. J., Ex. 85. In such case the person in receipt of the rents is liable, although only tenant for life. *Mansel v. Norton*, 22 Ch. D. 769, C. A. *Prima facie*, the outgoing tenant's remedy for tillages or tenant right is against the landlord, for there is, under ordinary circumstances, no privity between the outgoing and incoming tenants. The mere fact of the incoming tenant entering upon the land does not render him liable for such tillages, but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant, the landlord being discharged. *Codd v. Brown*, 15 L. T., N. S. 536; H. T. 1867, C. P.; *Sucksmith v. Wilson*, 4 F. & F. 1083, Martin, B.; and see *Faviell v.*

Gaskoin, ante, p. 316, and *Bradburn v. Foley*, 3 C. P. D. 128. And, a usage that the outgoing tenant should look to the incoming tenant for payment for such tillages, to the exclusion of the landlord's liability, is unreasonable and bad. S. C. Whatever the arrangement between the outgoing and incoming tenant, the landlord is entitled to a payment of arrears of rent due from the former out of the valuation. *Stafford v. Gardner*, L. R., 7 C. P. 242. The amount is recoverable by the tenant from the landlord on a *quantum meruit*, and the ascertainment of the amount by valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease. *Sucksmith v. Wilson*, ante, p. 316. Where a tenant holds on the general terms of cultivating according to good husbandry, drainage may be part of it, and a custom for the outgoing tenant to charge his landlord with part of the expense of such drainage, though done without his knowledge, is reasonable and consistent with the terms. *Mousley v. Ludlam*, 21 L. J., Q. B. 64. A stipulation that the tenant shall not sell any straw or manure produced on the farm without licence, disables him from selling it even after the tenancy has expired. *Massey v. Goodall*, 17 Q. B. 310; 20 L. J., Q. B. 526. By the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), sect. 57, "a tenant shall not be entitled to claim compensation by custom, or otherwise, than in manner authorised by this Act, in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act."

A valuation made in the usual way cannot be reopened although the valuers have included therein things which by the custom of the country should not have been valued or which did not exist, *per Kelly, C.B., Martin and Pigott, BB. Freeman v. Jeffries*, L. R., 4 Ex. 189.

Action by and against assignee of lessor.] The stat. 32 Hen. 8, c. 34, does not extend to parol contracts; *Standen v. Chrismas*, 10 Q. B. 135; but where the assignee can determine the tenancy, the continued holding of the tenant under him is evidence of an agreement with the assignee to hold on the old terms. *Buckworth v. Simpson*, 1 C. M. & R. 834, 844; *Arden v. Sullivan*, 14 Q. B. 832; *Cornish v. Stubbs*, L. R., 5 C. P. 334; *Smith v. Eggington*, L. R., 9 C. P. 145. In other cases the action must be in the name of the original lessor. *Bickford v. Parson*, 5 C. B. 923. See *Elliott v. Johnson*, L. R., 2 Q. B. 120; *Allcock v. Moorhouse*, ante, p. 305.

Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise is a question of fact. If such a tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation, contained in a former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley v. Monck*, L. R., 1 Ex. 159, Ex. Ch.

Breach.] As to proof of breach contract to repair or to use good husbandry, see post, tit. *Action on covenant to repair*. Where the customary course of husbandry, as alleged, is negatived by the jury, the plaintiff cannot recover for not cultivating according to the real custom. *Angerstein v. Handson*, 1 C. M. & R. 789. But, the judge may amend when the breach is non-repair. It is material and relevant for the defendant to show the bad state of the premises when demised. *Burdett v. Withers*, 7 Ad. & E. 136, and cases post, *Action on covenant to repair*.

ACTION ON BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES.

The law as to bills of exchange, cheques, and promissory notes has now been codified by the Bills of Exchange Act, 1882,* 45 & 46 Vict. c.61. The several sections of this act therefore now replace a large number of the decisions on these instruments, which were collected in previous editions of this work. The act, in Part II. enacts in detail the law, so far as relates to bills of exchange, and in Parts III. and IV., respectively enacts that relating to cheques and promissory notes: this is done to a great extent by reference to Part II., and this scheme is accordingly adopted in the following pages.

The following sections are general in their application:—

Sect. 2. "In this Act, unless the context otherwise requires,"—

"*Acceptance* means an acceptance completed by delivery or notification."

See sect. 21, *post*, p. 321. Acceptance is defined by sect. 17, *post*, p. 329, and its requisities are there stated.

"*Action* includes counter-claim and set-off."

"*Banker* includes a body of persons, whether incorporated or not, who carry on the business of banking."

"*Bankrupt* includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy."

"*Bearer* means the person in possession of a bill or note which is payable to bearer."

"*Bill* means bills of exchange. *note* means promissory note." These instruments respectively are defined by sect. 3, *post*, p. 319, and sect. 83, *post*, p. 375.

"*Delivery* means transfer of possession, actual or constructive, from one person to another." As to delivery, see sect. 21, *post*, p. 321.

"*Holder* means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." A holder in due course is defined by sect. 29, *post*, p. 322. The rights of holders are defined by sect. 38, *post*, p. 322.

"*Indorsement* means an indorsement completed by delivery." See sect. 21, *post*, p. 321. The requisites of an indorsement are stated in sect. 32, *post*, p. 336.

"*Issue* means the first delivery,' (*vide supra*), "of a bill or note, complete in form to a person who takes it as a holder."

"*Person* includes a body of persons whether incorporated or not."

"*Value* means valuable consideration." See sect. 27, *post*, p. 321.

"*Written* includes printed, and *writing* includes print."

By sect. 90. "A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

By sect. 91. "(1.) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority."

"(2.) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal."

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal."

Sect. 96 repeals numerous statutory enactments relating to bills of exchange, cheques, and notes.

* Cited for brevity as B. of Ex. Act, 1882.

By sect. 97 “(1.) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.”

“(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.”

“(3.) Nothing in this Act or in any repeal effected thereby shall affect—

(a.) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue :” *vide ante*, pp. 224, *et seq.*

“(b.) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies :” *vide post*, pp. 376, 377, and, Part III., *Actions by and against Companies.*

“(c.) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively :

(d.) The validity of any usage relating to dividend warrants, or the indorsements thereof.”

When a dividend warrant is payable to the order of two or more persons, it is the usage to pay to the order of one of them : this provision saves this exception from the general rule laid down by sect. 32 (3), *post*, p. 336.

By sect. 99. “Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.”

As to who is the holder of a bill see *Latter v. White*, L. R., 5 H. L. 578, *post*, p. 376.

ACTION ON BILLS OF EXCHANGE.

Statute.] The general sections of the B. of Ex. Acts, 1882, relating to bills of exchange are as follows :—

Sect. 3. “(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

“(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.”

“(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section ; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.”

“(4.) A bill is not invalid by reason—

(a.) That it is not dated ;

(b.) That it does not specify the value given, or that any value has been given therefor ;

(c.) That it does not specify the place where it is drawn or the place where it is payable.”

See sect. 12, *post*, p. 320, as to the insertion of the date in an undated bill.

Sect. 4. “(1.) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this Act ‘British Islands’ mean any part of the

United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty."

"(2.) *Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.*" This subsection is new.

By sect. 97. (3, a.), *ante*, p. 319, nothing in this act affects the Stamp Acts.

Sect. 5. "(1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee."

Sect. 6. "(1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty."

"(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange."

Sect. 7. "(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."

"(2.) A bill may be made payable to two or more payees jointly, *or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.*"

The provision in italics is new; *vide post*, p. 377.

Sect. 9. "(1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(a.) With interest.

(b.) By stated instalments.

(c.) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(d.) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill."

"(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof."

As to damages on the dishonour of a bill, see sect. 57, *post*, p. 359.

Sect. 10. "(1.) A bill is payable on demand—

(a.) Which is expressed to be payable on demand, or at sight, or on presentation; replacing 34 & 35 Vict. c. 74; "or

(b.) In which no time for payment is expressed."

"(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand."

Sect. 11. "A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

(1.) At a fixed period after date or sight."

As to fixing the due date, see sect. 14 (2), (3), *post*, pp. 328, 329, and sect. 65 (5), *post*, p. 356.

"(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect."

Sect. 12. "Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date."

As to the insertion of other material particulars omitted, *vide*, s. 20 *infra*.

Sect. 13. "(1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be."

"(2.) A bill is not invalid by reason only that it is ante-dated or post dated, or that it bears date on a Sunday."

Sect. 20. "(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit."

"(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact."

Provided that if any such instrument after completion is negotiated to a holder in due course" (*vide* sect. 29, *post*, p. 322) "it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given."

Sect. 21. "(1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery" (*vide* sect. 2, *ante*, p. 318) "of the instrument in order to give effect thereto."

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable."

"(2.) As between immediate parties, and as regards a remote party other than a holder in due course," (*vide* sect. 29, *post*, p. 322) "the delivery—

(a.) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(b.) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course" (*vide* sect. 29, *post*, p. 322) "a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed."

"(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

Sect. 22. "(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract."

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations." By sect. 91 (2), *ante*, p. 318, the seal of a corporation on a bill is equivalent to signature.

"(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

By Sect. 27. "(1.) Valuable consideration for a bill may be constituted by,—

(a.) Any consideration sufficient to support a simple contract;

(b.) An antecedent debt or liability. Such a debt or liability is deemed

valuable consideration whether the bill is payable on demand or at a future time."

"(2.) Where value has at any time been given for a bill the holder" (*vide* sect. 2, *ante*, p. 318), "is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time."

"(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

Sect. 29. "(1.) A holder in due course is a holder" (see sect. 2, *ante*, p. 318) "who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

(a.) That he became the holder of it before it was overdue" (*vide* sect. 14, *post*, p. 328) "and without notice that it had been previously dishonoured, if such was the fact:

(b.) That he took the bill in good faith" (*vide* sect. 90, *ante*, p. 318), "and for value" (*vide* sect. 27, *supra*), "and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

"(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

"(3.) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

It will be seen that this section substitutes the term "holder in due course," for "*bonâ fide* holder for value without notice." The rights of a holder in due course are defined by sect. 38, *infra*. Defect of title is used in this Act as equivalent to "equity attaching to the bill." "Force and fear" is the equivalent in the Scottish dialect for duress. The effect of taking a bill overdue or dishonoured is defined by sect. 36 (2, 5), *post*, p. 360.

By Sect. 30, "(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value."

"(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course," (*vide supra*); "but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

Sect. 37. "Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act," (*vide* sect. 59 (3), *post*, p. 367, and sect. 61, *post*, p. 369) "re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable."

Sect. 38. "The rights and powers of the holder" (*vide* sect. 2, *ante*, p. 318) "of a bill are as follows:

(1.) He may sue on the bill in his own name:

(2.) Where he is a holder in due course," (*vide* sect. 29, *supra*) "he holds the bill free from any defect of title" (*vide supra*) "of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3.) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill

and (b) if he obtains payment of the bill the person who pays him in due course" (*vide* sect. 59 (1), *post*, p. 367) "gets a valid discharge for the bill."

Sect. 53. "(1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument."

Sect. 58. "(1.) Where the holder" (*vide* sect. 2, *ante*, p. 318) "of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery.'"

"(2.) A transferor by delivery is not liable on the instrument."

"(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless."

Sect. 71. "(1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill."

"(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays" (*vide* sect. 59 (1), *post*, p. 367) "the part first presented to him." As to stamp on bills in sets, *vide ante*, p. 227.

Sect. 72. "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue" (*vide* sect. 2, *ante*, p. 318), "and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement" (*vide* sect. 2, *ante*, p. 318), "or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

(a.) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b.) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

"(2.) Subject to the provisions of this Act," (*vide infra*) "the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom."

"(3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured."

"(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the

place of payment on the day the bill is payable." The value for stamp duty is ascertained at the date of the instrument, *vide ante*, p. 214.

"(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

Amount of bill.] There is now no restriction as to the amount of a bill, for the stat. 48 Geo. 3, c. 88, s. 2, is repealed by the B. of Ex. Act, 1882, s. 96.

Production of the bill.] It is generally necessary for the plaintiff to produce the bill or note on which he claims, whenever the form of pleading puts it in issue; and even when not in issue, interest is not recoverable without production. *Hutton v. Ward*, 15 Q. B. 26; 19 L. J., Q. B. 293. But, where it appears that it has been destroyed, as where the defendant tore his own note of hand, a copy is admissible; *Anon.*, 1 Ld. Raym. 731; or, other secondary evidence may be given where the defence is not raised that the instrument is lost or destroyed. *Blackie v. Pidding*, *Charnley v. Grundy*, *infra*. Thus, under a defence denying acceptance, it is not competent for defendant to avail himself of the defence that plaintiff, an indorsee, has lost the bill and cannot produce it. *Blackie v. Pidding*, 6 C. B. 196. So, in an action on a note against maker, the defence of the loss of it must be pleaded specially. *Charnley v. Grundy*, 14 C. B. 608; 23 L. J., C. P. 121. The principle of this defence is that the holder of a negotiable security is only entitled to payment on production of it for re-delivery to the person liable to pay. If the defendant refuses to pay on that ground only, as where it is destroyed or is lost, there must be a plea to that effect. In *Poole v. Smith*, Holt, N. P. 144, Gibbs, C. J., seems to have held that where the bill is lost after plea pleaded, the defence might be raised without a special plea: *sed quære*.

By Sect. 69. "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so."

Sect. 70. "In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question." See sect. 51, 8, *post*, p. 352, as to protest on lost bill.

Unless the plaintiff avail himself of relief afforded by these sections he cannot, where the defence is properly pleaded, recover on a lost bill indorsed by the payee without proving that it had been destroyed; though he had offered an indemnity to the defendant; *Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; and, though the bill was lost after it became due; S. C.; or, was payable to the plaintiff's order and not indorsed when lost; *Ramuz v. Crowe*, 1 Exch. 167. See further *Conflans Stone Quarry Co. v. Parker*, L. R., 3 C. P. 1. And, the loss of a bill in a negotiable state, is fatal to a recovery, on the debt, for which the bill was given, as well as, on the bill. *Crowe v. Clay*, 9 Exch. 604; 23 L. J., Ex. 150, Ex. Ch. Even an express promise by the defendant to pay the bill will not entitle the plaintiff to recover on it. *Davis v. Dodd*, 4 Taunt. 602. But, the payee of a note, not negotiable, may require payment without producing it. *Wain v. Bailey*, 10 Ad. & E. 616; and see *per Jervis*, C. J., in

Charnley v. Grundy, 14 C. B. 614 ; 23 L. J., C. P. 122. If the acceptor improperly detain the bill in his hands, the drawer or other party may sue him upon it, without giving him notice to produce it ; *Smith v. M'Clure*, 5 East, 477 ; and, where the defendant had admitted that he owed the money due upon a bill which was in his own possession, Abbott, C. J., held that such admission might be given in evidence under the common counts without a notice to produce the bill. *Fryer v. Brown*, Ry. & M. 145. An admission of the handwriting of the defendant to his acceptance is *prima facie* evidence of the regularity of such acceptance, and it dispenses with production, unless there be a "saving of just exceptions ;" *Chaplin v. Levy*, 9 Exch. 531 ; 23 L. J., Ex. 117 ; cited *ante*, p. 71 ; and see *Sharples v. Rickard*, 2 H. & N. 57 ; 26 L. J., Ex. 302, where, in an action by indorsee against drawer, the court doubted whether on traverses only of presentment for acceptance and notices of dishonour, it was necessary to produce the bill. And where notice to produce must be given, see *ante*, pp. 7, *et seq.*

The bill or note produced must appear to be the same upon which the plaintiff claims ; and if any material variance exists, it will be fatal, unless amended by leave of the judge at Nisi Prius. Where a bill appears to be altered it lies upon the party producing it to show that the alteration was made under such circumstances as not to vitiate the instrument ; *Hewman v. Dickinson*, 5 Bing. 183 ; and it cannot be left to the jury on the mere inspection of the bill, without other proof, to decide whether it was altered at the time of making or at a subsequent period. *Knight v. Clements*, 8 Ad. & E. 215. Where a note payable in two months was dated, by mistake, January, 1854, instead of 1855, but crossed by the maker before delivery, "due 4th March, 1855," it was held that this operated as a correction, and that the note was rightly described as of 1855. *Fitch v. Jones*, 5 E. & B. 238 ; 24 L. J., Q. B. 293. See further as to alterations in a bill, *ante*, pp. 230, 231, and *Defence, post*, p. 360, *et seq.*

Variance in parties—Liability on the bill—Statute.] A nominal partner who is named in the bill must join in suing. *Guidon v. Robson*, 2 Camp. 302.

By sect. 23, "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such : Provided that

- (1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name :
- (2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."

As to signature by agent, *vide* sect. 91, *ante*, p. 318.

By sect. 53, "(1.) The drawee of a bill who does not accept as required by this Act" (*vide* s. 17 (2), *post*, p. 329) "is not liable on the instrument."

Sect. 24. "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery."

See sect. 21 (1), *ante*, p. 321, as to the effect of notification by the drawee that bill is accepted ; sect. 54 (1), *post*, p. 330, of the effect of acceptance ; sect. 55 (1) (b), *post*, p. 342, of drawing ; sect. 55 (2) (b) (c), *post*, p. 357, of

indorsing. See also sect. 60, *post*, p. 371, and sect. 82, *post*, p. 374, for the special protection of bankers.

Sect. 25. "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

By sect. "26 (1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

"(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

As to amendment in case of variance of parties, see *ante*, p. 86. As to signature on behalf of companies, *vide post*, pp. 376, 377.

By sect. 58 (2.) "A transferor by delivery is not liable on the instrument."

A person is not liable as acceptor who accepts by procuration for the drawee, but without his authority. S. C.; *Eastwood v. Bain*, 3 H. & N. 738; 28 L. J., Ex. 74. He is, however, liable for breach of warranty of authority, *vide Action on warranty of Authority, post*. And, if one of several partners accept a bill in his own name on behalf of the partnership, having no authority to bind the firm, he will be personally liable as acceptor. *Owen v. Van Uster*, 10 C. B. 318; 20 L. J., C. P. 61; *Nicholls v. Diamond*, 9 Exch. 154; 23 L. J., Ex. 1.

Variance in names, &c.] Although variances are now in most cases amendable, it has been thought as well to retain the cases as bearing upon other important points. Where initials or some contraction are used for a Christian name are used in the bill itself, the same initials or contraction may be used in the writ or statement of claim by 3 & 4 Will. 4, c. 42, s. 12; but, it may become necessary to identify the parties so designated, and, if the name is spelt wrongly, oral evidence is admissible to show who was intended. *Willis v. Barrett*, 2 Stark. 29. Where a bill is drawn with the payee's name in blank, and in the statement of claim it is stated that A. B. (a *bond fide* holder who has inserted his own name) was payee, it is no variance. *Attwood v. Griffin*, Ry. & M. 425. In an action against several joint makers of a note, it is no objection, on the ground of variance, that one of them, who has let judgment go by default, has been sued by a wrong Christian name; the identity of the party and service of the writ on him being shown. *Dickinson v. Bowes*, 16 East, 110. The name of a party to the bill may be stated as on the bill, though it be not the real name. *Forman v. Jacob*, 1 Stark. 47.

Variance in the place of payment.] If a bill is drawn payable at a particular place, this, as against the drawer, is part of the contract, and it is a variance to state it without that qualification; Bayley on Bills, 310; but, as against the acceptor, this is now, by reason of sect. 19 (*post*, p. 329), no variance, unless the bill be accepted payable at a particular place, and not "otherwise or elsewhere." So, where a bill was directed to "A. B., payable in London," payment in London was held part of the contract. *Hodge v. Filleis*, 3 Camp. 463. And, where a note contains, in the body of it, a promise to pay at a particular place, it is a variance to omit the place. *Spindler v. Grellett*, 1 Exch. 384; *Vanderdonckt v. Thellusson*, 8 C. B. 812; *Sanderson v. Bowes*, 14 East, 500. But, when the place of payment is only mentioned in

the memorandum at the foot of a note, it is no variance to omit it; *Price v. Mitchell*, 4 Camp. 200; *Williams v. Waring*, 10 B. & C. 2; and, this seems to be now settled, *Masters v. Baretto*, 8 C. B. 433, notwithstanding *Trecothick v. Edwin*, 1 Stark. 468, *contra*. And, the reason is not because a writing in the corner may not be part of a contract, but because by the usage of merchants it is a mere memorandum, there written for the convenience of parties. *Per cur. Warrington v. Early*, 2 E. & B. 766; 23 L. J., Q. B. 47. But, where a note was alleged to be payable at a certain place, and it was only made so payable by a memorandum at the bottom, *Abbott, C. J.*, held it no variance; *Hardy v. Woodroffe*, 2 Stark. 319; *Sproule v. Legg*, 3 Stark. 157; and, the reason seems to be that, if payable generally, it is payable at the place named. *Blake v. Beaumont*, 4 M. & Gr. 7.

Variance in consideration.] The words "value received," in a bill payable to the drawer's order, mean value received by the drawee; and if he stated to be value received by the drawer, it is a variance. *Higmore v. Primrose*, 5 M. & S. 65; *Priddy v. Henbrey*, 1 B. & C. 674. But, where the bill is drawn payable to the order of a third person, "for value received," it is no variance to state that it was for value received "of the drawer." *Grant v. Da Costa*, 3 M. & S. 351. "Value received," in a note, imports value received from the payee. *Clayton v. Gosling*, 5 B. & C. 360.

Variance in the sum.] The money mentioned in the statement of claim on a bill means English money; if the bill is really for foreign money it is a variance. *Kearney v. King*, 2 B. & A. 301; *Sprole v. Legge*, 1 B. & C. 16.

By sect. 9 (2) "Where the sum payable," by a bill, "is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable."

Ambiguous and irregular instruments.] Sect. 3 (1), *ante*, p. 319, defines a bill of exchange, and (2), enacts that an instrument not complying with the conditions therein stated is not a bill. See also sects. 6 (2) and 7 (2), *ante*, p. 320.

By sect. 5 (2) "Where in a bill drawer and drawee are the same person," (*vide* sect. 2, *ante*, p. 318) "or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note."

By sect. 7 (3) "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

The following instrument, "I promise to pay to J. B. or order," &c., signed "J. B." with J. G.'s name and address in the corner, and J. G.'s name written across it as an acceptance, and indorsed by J. B., may be treated by the holder as against J. B., as a note by him; *Edis v. Bury*, 6 B. & C. 433; and *semble*, at the holder's election as a bill of exchange. *Id.* "Pay without acceptance to the order of J. C. F.," signed by the manager on behalf of a joint-stock banking company at one place and addressed to the company at another, is, as against a partner in the company, a promissory note. *Miller v. Thomson*, 3 M. & Gr. 576.

The manager of an incorporated company wrote to the cashier thus: "53 days after date credit P., or order, with the sum of 500l, claimed *per* 'Cleopatra,' in cash on account of this corporation," signed by the manager. This was held to be a bill of exchange. *Ellison v. Collingridge*, 9 C. B. 570; 19 L. J., C. P. 268.

"I promise to pay T. L. or order," signed H. O.: the name of the defendant was on the left corner, and his acceptance across it. Held, that T. L. might sue defendant on it as a bill of exchange. *Lloyd v. Oliver*, 18

Q. B. 471; 21 L. J., Q. B. 307; and *semb.*, it might have been treated as either a bill or a note as against H. O. *Id.* An instrument payable to order, with a direction "at Messrs. A. B.," instead of *to Messrs. A. B.* may also be treated as a bill or note, in an action against the drawer. *Shuttleworth v. Stephens*, 1 Camp. 407; *Allan v. Mawson*, 4 Camp. 115.

Without the drawer's signature, a bill though accepted is of no force (see sect. 3, *ante*, p. 319), and cannot be treated as a promissory note; *Stoessiger v. S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J., Q. B. 293; *Goldsmid v. Hampton*, 5 C. B., N. S. 94; 27 L. J., C. P. 286; *McCall v. Taylor*, 19 C. B., N. S. 301; 34 L. J., C. P. 365.

So, a bill not directed to any drawee is void as a bill, and an acceptance by some one, to whom it is not directed, is no acceptance; *Peto v. Reynolds*, 9 Exch. 410; *Davis v. Clarke*, 6 Q. B. 16; unless he be an acceptor for honour; *Polhill v. Walter*, 3 B. & Ad. 122.

An acceptance where there is no drawee named may make the person accepting liable as on a promissory note by himself. *Peto v. Reynolds*, *supra*. In *Fielder v. Marshall*, 9 C. B., N. S. 606; 30 L. J., C. P. 158, S. M. was sued on the following instrument:—"Pay to Mrs. E. F., or order," (*Signed*) "A. L.;" directed "To Mrs. E. F., Nelson Lodge, Chelsea," and across was written, "Accepted, S. M.;"—the whole document except "A. L." was written by the defendant, and was given by him to E. F. to secure a debt from A. L. to her; and it was held that the address, "To Mrs. E. F.," might be treated as a repetition of the payee's name, and not as a drawee, and the document as a promissory note made by S. M.

Payee against Acceptor.

The proofs in this action entirely depend upon the pleadings. If the acceptance is intended to be put in issue, it must be traversed by the statement of defence. See *post*, *Defence*, p. 360.

Bill when payable—Statute.] Sects. 10, 11, *ante*, p. 320, respectively define what bills are payable on demand, and what bills are payable at a determinable future time.

By sect. 14. "Where a bill is not payable on demand" (*vide* sect. 10, *ante*, p. 320) "the day on which it falls due is determined as follows:

"(1.) Three days, called days of grace, are, in every case where the bill itself otherwise does not provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

(a.) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day" (*vide* sect. 92, *post*, p. 349);

"(b.) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day" (*vide* sect. 92, *post*, p. 349).

"(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment."

"(3.) Where a bill is payable at a certain period after sight, the time begins

to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery."

"(4.) The term 'month' in a bill means calendar month."

By sect. 65 (5) "Where a bill payable after sight is accepted for honour, *its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.*" The provision in italics is new.

Bill when payable.—It follows from sect. 14 (1) that where a fast-day alone is proclaimed, the bills due that day are payable the day before, but if the proclamation further appoint the day to be kept as a bank holiday, they are payable the day after the fast-day.

Where a bill is drawn at so many months after date, calendar months are intended, sect. 14 (4), *supra*; and the day on which it falls due is always regulated by the day of the date, irrespective of the length of the months, and in ordinary cases will be the day with the same number in the last month of the currency; thus a bill drawn at two months on the 10th of January, will be due on the 10th of March. But, if the date be one of the last days of a month having more days than the month in which the bill becomes due, then the bill will be due on the last day of that month: thus, bills drawn, at one month, on the 28th, 29th, 30th, or 31st of January, will, it would seem, in ordinary years, be all due on the 28th of February, and with the days of grace payable on the 3rd of March; Byles on Bills, 11th ed., p. 204; Story on Bills, 2nd ed. s. 330, pp. 74-75; Marius, 4th ed. p. 18; and the dicta of the judges in *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226, and in *Webb v. Fairmaner*, 3 M. & W. 473.

Acceptance.—Statute. By sect. 2 "Acceptance means an acceptance completed by delivery or notification," as to which *vide* sect. 21, *ante*, p. 321.

Sect. 17. "(1.) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer."

"(2.) An acceptance is invalid unless it complies with the following conditions, namely:

(a.) It must be written on the bill and be signed by the drawee" (19 & 20 Vict. c. 97, s. 6). "The mere signature of the drawee without additional words is sufficient" (41 & 42 Vict. c. 13).

"(b.) It must not express that the drawee will perform his promise by any other means than the payment of money."

As to acceptance of a bill drawn in a set, *vide* sect. 71 (4), *post*, p. 330. As to signature by agent, *vide* sect. 91, *ante*, p. 318.

Sect. 18. "A bill may be accepted,

"(1.) before it has been signed by the drawer, or while otherwise incomplete":

"(2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment":

"(3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance."

Sect. 19 "(1.) An acceptance is either (a) general or (b) qualified."

"(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

(a.) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:

(b.) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn :

(c.) local, that is to say, an acceptance to pay only at a particular specified place :

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere" (1 & 2 Geo. 4, c. 78, s. 1) :

"(d.) qualified as to time :

(e.) the acceptance of some one or more of the drawees, but not of all."

By sect. 20 (1), *ante*, p. 321, the acceptor's contract is incomplete and revocable until delivery of the bill has been made, or notification of acceptance given as described in that section.

By sect. 44 (1), *post*, p. 343, "the holder of a bill may refuse to take a qualified acceptance." As to the effect of taking such an acceptance, *vide* sect. 44 (2), *post*, p. 343.

Sect. 52. "(1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable."

"(2.) When by the terms of a qualified acceptance" (*vide* sect. 19, *supra*) "presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures."

"(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him."

Sect. 54. "The acceptor of a bill, by accepting it—

(1.) Engages that he will pay it according to the tenor of his acceptance" (*vide* sect. 19, *supra*) :

"(2.) Is precluded from denying to a holder in due course" (*vide* sect. 29, *ante*, p. 322) :

"(a.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;

(b.) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

(c.) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

By sect. 71 (4) Where a bill is drawn in a set, "The acceptance may be written on any part, and it must be written on one part only."

"If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course" (*vide* sect. 29, *ante*, p. 322), "he is liable on every such part as if it were a separate bill."

Acceptance, general or qualified.] A conditional acceptance will not support the allegation of a general one, though the condition has been performed. *Langston v. Corney*, 4 Camp. 177 ; *Ralli v. Savell*, D. & Ry. N. P. C. 33 ; *Swan v. Cox*, 1 Marsh. 176. But, where the drawee has accepted on condition of an extension of time for payment, the indorsee may sue as on a bill accepted payable at the postponed date. *Russell v. Phillips*, 14 Q. B. 891. Drawee of a bill, dated 8th September, at four months, accepted generally, adding the words "due 11th December." Held, a memorandum for his own convenience perhaps accidentally misdated, and not a qualified acceptance. *Fanshawe v. Peet*, 2 H. & N. 1 ; 26 L. J. Ex. 314. "Accepted, payable on giving up a bill of lading for goods, &c., *per* Amazon," is a conditional acceptance, binding the holder to give up the bill of lading on presentment for payment, but, not imposing on him a further condition to the acceptor's liability, that the bill of lading should be

given up on the very day the bill falls due. *Smith v. Vertue*, 9 C. B., N. S. 214; 30 L. J., C. P. 56. Whether an acceptance be general or qualified is a question of law for the judge. *Sproat v. Matthews*, 1 T. R. 182.

An acceptance, expressed to be payable at a banker's or other place, was formerly held to be a special or qualified, and not a general, acceptance. *Rowe v. Young*, 2 B. & B. 165. But by sect. 19 (2), *ante*, p. 320, replacing Onslow's Act (1 & 2 Geo. 4, c. 78), s. 1, such acceptance is general unless it expressly states that the bill is to be paid there *only, and not elsewhere*. A bill which is *drawn* payable at a particular place is within this section; there being no distinction between the case where the bill is so rendered payable by the language of the drawer, or of the acceptor; and unless the acceptance be special within the statute, it is unnecessary, *as against the acceptor*, to aver or prove any presentment. *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531. The use of the word "only" is not essential to qualify the acceptance, if the words "and not elsewhere" are inserted. *Higgins v. Nichols*, 7 Dowl. 551. By sect. 52 (1), *ante*, p. 330, when a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable; and if the holder neglect to present, and the bankers, at whose house it is made payable generally, fail, with money of the acceptor in their hands, the acceptor is not thereby discharged. *Turner v. Hayden*, 4 B. & C. 1. But, by sect. 54 (1), if the acceptance is local, the plaintiff must prove presentment at the place named, in order to charge the acceptor; and this was the rule at common law. *Rowe v. Young*, *supra*. An acceptance payable at the acceptor's bankers is equivalent to an order on the banker to pay the bill to any holder who can by law give a valid discharge for it, and to debit his customer with the amount. *Roberts v. Tucker*, 16 Q. B. 560; 20 L. J., Q. B. 270, Ex. Ch.

A bill of exchange drawn generally may now be accepted in three ways; either generally, or payable at a particular banker's, or at a particular banker's and not elsewhere. If the drawee accepts generally, he undertakes to pay the bill at maturity when presented to him. If he accepts payable at a banker's, he undertakes to pay the bill at maturity, when presented, either to himself or at the banker's. If he accepts payable at a banker's and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise. *Halstead v. Skelton*, 5 Q. B. 93.

Acceptance, how proved.] The acceptance, where traversed, is proved by evidence of the acceptor's handwriting, and the production of the bill, with such proof, is *prima facie* evidence of acceptance before action brought, as the presumption is that it was accepted within a reasonable time after date, according to the regular course of business, and before maturity. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J., C. P. 69. What is such reasonable time depends on the places of residence of the parties, &c. *Per cur.*, *Id.* If several, not partners, are acceptors, the handwriting of all must be proved. *Gray v. Palmers*, 1 Esp. 135.

Acceptance by partners.] By sect. 23 (2), *ante*, p. 325, "the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm." If one of several partners accepts a bill drawn on the firm, it is sufficient to prove the partnership, and his handwriting, in an action against all; *Mason v. Rumsey*, 1 Camp. 384; and, where a bill was directed to "E. M. and others, trustees of," &c., and was "accepted E. M.," it was held that, on proving that E. M. accepted by authority of the other trustees, plaintiff could recover on the bill against the others, as well as against E. M., though E. M. alone signed,

and did not expressly sign on behalf of the rest. *Jenkins v. Morris*, 16 M. & W. 877. But, the name of the firm must appear on the face of the instrument, and an action cannot be maintained thereon against the firm, when one partner signed his own name only, although the proceeds were in reality applied to partnership purposes; *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7; *Nicholson v. Ricketts*, 2 E. & E. 497; 29 L. J., Q. B. 55; for no person whose name, or the name of whose firm, does not appear on the bill can be liable on it; *Emly v. Lye*, *supra*; *Beckham v. Drake*, 9 M. & W. 79, 92, 96; *Miles' Claim*, L. R. 9 Ch. 635, and see sect. 23, *ante*, p. 325. It was, indeed, held in *Mason v. Rumsey*, *ante*, p. 331, that where a bill was directed to a firm, an acceptance by one partner in his own name was sufficient, but, this decision is not in accordance with the later decisions cited above, and the reason given by Ld. Ellenborough that "it would have been enough if the word 'accepted' had been written on the bill," is now removed by sect. 17 (2) (a), *ante*, p. 329. Where a bill is accepted by a partner in a firm in a name common to himself and the firm, and he carries on no business separate from the firm, there is a presumption that the bill is accepted for and binds the firm. *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109, 121, C. A. This presumption may, however, be rebutted by evidence that the bill was accepted as that of the partner for his own private purposes, and not as that of the firm. S. C.

It is a good defence that the plaintiff had notice that the firm would not be bound by such an acceptance; *Gallway Ltd., v. Mathew*, 10 East, 264; *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Exch. 838, or, that the bill was not accepted for partnership purposes, and that there was connivance between the partner who accepted and the plaintiff. *Shirreff v. Wilks*, 1 East, 48. Although it was formerly held that, in the absence of fraud or collusion, a party who had received a bill given by one or several partners in the name of the firm for his separate debt, might sue the partnership on such bill; *Swan v. Steele*, 7 East, 210; *Ridley v. Taylor*, 13 East, 175; *Lloyd v. Ashby*, 2 B. & Ad. 23; it is now established that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who takes the security to remove, by showing either that the party from whom he received it acted with the authority of the rest of his partners, or that he himself had good reason to believe so. *Leverson v. Lane*, 13 C. B., N. S. 278; 32 L. J., C. P. 10; *Ex pte. Darlington Joint Stock Banking Co.*, 34 L. J., Bky. 10; *Arden v. Sharp*, 2 Esp. 524; *Green v. Deakin*, 2 Stark. 347; see also *Heilbut v. Nevill*, L. R., 4 C. P. 354; Ex. Ch., L. R., 5 C. P. 478, cited *post*, Part III., *sub. tit. Actions by trustees of bankrupts—Fraudulent conveyance*; this defence was formerly raised by a traverse of the acceptance. *Hogg v. Skeen*, 18 C. B., N. S. 426; 34 L. J., C. P. 153, explaining *Musgrave v. Drake*, 5 Q. B. 185. But under Rules, 1883, O. xix., r. 15, *ante*, p. 283, it would seem it ought to be specially pleaded.

Where one partner has subscribed in a style slightly differing from the real name of the firm, it is a question for the jury whether he had authority from the firm to do so; or whether he must be taken to have issued the bill on his own account. *Faith v. Richmond*, 11 Ad. & E. 339. And, it seems that no partner has any implied authority to bind in any but the true style of the firm. *Kirk v. Blurton*, 9 M. & W. 284. Where a bill was accepted by one of two partners, "J. B. & Co.," the true style being "J. B.," the firm was held, as matter of law, not bound. S. C. The correctness of the application of the law in this case has, however, been doubted, on the ground that it was a question for the jury whether "J. B." and "J. B. & Co." did not mean the same thing. *Stephens v. Reynolds*, 5 H. & N. 513;

29 L. J., Ex. 278, *per* Martin, B. See also *MacLae v. Sutherland*, 3 E. & B. 36 ; 23 L. J., Q. B. 242, *per cur.* And, one of two partners may perhaps, under the general authority conferred by the partnership, bind the other by signing the true names of both, instead of the fictitious name of the firm. *Norton v. Seymour*, 3 C. B. 792, 794, *per* Maule, J. As to the liability of partner on an acceptance in blank by his co-partner, see *Hogarth v. Latham*, 3 Q. B. D. 643, C. A., and cases there cited.

The implied power of one partner to bind the others by his acceptance, &c., of bills does not extend to partnerships other than for trading purposes, such as solicitors. *Hedley v. Bainbridge*, 3 Q. B. 316 ; see *Forster v. Mackreth*, L. R., 2 Ex. 163, cited *post*, p. 371 ; or, brokers ; *Yates v. Dalton*, 28 L. J. Ex. 69. So, there is no implied authority in a director of a joint-stock company, not being a trading partnership, to accept bills on the part of the directors of the company. *Bramah v. Roberts*, 3 N. C. 963. Nor, is there any implied authority to the directors of a mining company, to bind the shareholders by making notes or accepting bills. *Dickinson v. Valpy*, 10 B. & C. 128. But, if it be shown to be necessary from the very nature of the company, or usual in similar companies, to draw and accept bills, it would be reasonable that the directors should have such powers, and the law would imply it ; *per* Bosanquet, J., *Ibid*.

After a partnership is proved, the admission of one partner that he accepted the bill in the name of the firm will be proof of the acceptance as against all. *Hodenpyl v. Vingerhoed*, *per* Abbott, C. J., MSS. ; Chitty on Bills, 627, 9th ed. ; see *ante*, p. 68.

A railway company incorporated in the usual manner, cannot draw, accept or indorse bills. *Bateman v. Mid Wales Ry. Co.*, L. R., 1 C. P. 499. Nor, has a company incorporated under the Companies Act, 1862, this power, unless it is, at any rate impliedly, given by the memorandum and articles of association. *Peruvian Ry. Co. v. Thames & Mersey Marine Insurance Co.*, L. R., 2 Ch. 617. But, where a company has the power, and represent that they have exercised it, they cannot afterwards set up an informality in the execution of the power. *Ex pte. Overend, Gurney & Co.*, L. R. 4 Ch. 460. As to the liability of directors, who accept a bill for a company, which cannot accept bills, *vide post*, p. 443.

The power of registered companies to make or accept notes and bills is regulated by statute. See *post*, Part III., *Actions by and against companies*.

Acceptance by agent.] By sect. 26, *ante*, p. 326, an agent will be personally liable to third persons by drawing, indorsing, or accepting in his own name, unless he unequivocally show on the face of the writing that he signs only in a ministerial capacity. Thus, a bill was drawn, "Pay to J. S. or order £200, value received, and place same to account of Y. B. Co., as per advice from C. M. to H. B." (the defendant) "cashier of the Y. B. Co.," and the defendant wrote, "Accepted per H. B.;" it was held that defendant was personally liable, although he accepted by direction of the company. *Thomas v. Bishop*, 2 Str. 955. So, where an agent to a country branch of a London bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name a bill for the amount upon the firm in London, he was held liable, although the plaintiff knew he was agent only. *Leadbitter v. Farrow*, 5 M. & S. 345. See also the cases cited, *Promissory notes*, *post*, pp. 376, 377. Where a bill was directed "to the A. C. Mining Co.," and was accepted in his own name, "for the A. C. Mining Co.," by one of the managing partners who had no authority to sign for the rest, it was held that on proof of his being partner in the adventure he was liable on the acceptance. *Owen v. Van Uster*, 10 C. B. 318 ; 20 L. J., C. P. 61. So, where a bill was directed to "J. D., purser of W. D. Mining Co.," being

an unincorporated company, and the acceptance was "J. D., *per pro*. W. D. Mining Co.," held that J. D. was personally liable, being himself a shareholder, and not authorised to bind the rest; and this, although at the time of acceptance he notified to the plaintiffs, the drawers, his intention not to be personally bound. *Nicholls v. Diamond*, 9 Exch. 154; 23 L. J., Ex. 1. And, where a bill directed to a person who was only purser and not an adventurer, purported to be in payment for goods supplied to the company, and the drawee accepted it "for the company, W. C. purser," he was held liable; for the bill was not directed to the company, and therefore could not be accepted by, or by procuration for them, and the acceptance "for the company" was not inconsistent with an intention on the part of the defendant to bind himself; and, being at most only ambiguous, must be taken to be operative against him. *Mare v. Charles*, 5 E. & B. 978; 25 L. J., Q. B. 119. *Semble*, if the acceptance had been "*per procuration*," it would have been inoperative. S. C.

If the acceptance is by an agent, his authority and handwriting must be proved. An admission by defendant of his liability on another bill, accepted by the same agent, is confirmatory evidence, after other proof, of a general authority. *Llewellyn v. Winckworth*, 13 M. & W. 598. But *semb.*, it would not be evidence *per se*. S. C. As to signature by procuration, see sect. 25, *ante*, p. 326. If an agent, as apparent principal, carry on a business for another, to which business the drawing or accepting bills is incidental, the principal cannot, by secret instructions to his agent, divest the latter of the power of drawing and accepting bills. *Edmunds v. Bushell*, L. R., 1 Q. B. 97. Proof that the defendant's wife conducted his business and had applied the proceeds of the bill in payment of debts incurred in the business, and absence of any proof by whom the defendant's name was written as acceptor, is no evidence that the defendant had sanctioned the acceptance. *Goldstone v. Tovey*, 6 N. C. 98. Proof of an acceptance by the wife, in her own name, of a bill drawn on her husband, and that he, after looking at it, promised to pay, saying he knew all about it, is evidence that he authorised this mode of acceptance, and he is bound by it. *Lindus v. Bradwell*, 5 C. B. 583. The manager of a co-partnership, as such a manager, has not authority to sign the name of the firm. *Beveridge v. Beveridge*, L. R., 2 H. L. Sc. 183. See also *post*, pp. 337, *et seq.*, *sub tit.*, *Indorsement, how proved*.

Proof of acceptance by admission.] By sect. 21 (1), *ante*, p. 321, where an acceptance is written on a bill notice by the drawee to the person entitled thereto, that he has accepted it, makes the acceptance complete and irrevocable. By sect. 24, *ante*, p. 325, subject to the provisions of the Act, a forged or unauthorised signature is wholly inoperative unless the party against whom it is sought to enforce payment of the bill is precluded (see sect. 54 (2), *ante*, p. 330), from setting up the forgery or want of authority. But this is not to "affect the ratification of an unauthorised signature not amounting to a forgery." It seems, therefore, that a forged acceptance cannot be ratified except perhaps in a case falling within sect. 21 (1). See *Brook v. Hook*, L. R., 6 Ex. 89. The defendant paid a bill of exchange (of which the plaintiff was holder) on which his acceptance had been forged. In an action against him on another bill similarly accepted, the jury found that the signature was not made by the defendant's authority, nor had he adopted it; that the defendant did not know that the plaintiff was the holder of the former bill, nor did he lead the plaintiff to believe that the acceptance was his. It was held that the payment by him of the former bill did not estop the defendant from denying the authority to accept. *Morris v. Bethell*, L. R., 5 C. P. 47. See also *McKenzie v. British Linen Co.*, 6 App. Ca. 82, D. P.

Where in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to the bill, describing it, and adding, "and which said bill was accepted by the said defendant," the notice was held to be *prima facie* evidence of the acceptance. *Holt v. Squire*, Ry. & M. 282.

Proof of identity of acceptor.] *Vide ante*, pp. 118, 127.

Acceptance before drawing.] As to acceptance of a bill before it is filled in, see sect. 20, *ante*, p. 321. The Statute of Limitations is no defence to an action by a holder in due course, *vide* sect. 29, *ante*, p. 322; though the drawer issued the bill improperly after a lapse of 12 years; *Montague v. Perkins*, 22 L. J., C. P. 187. And, even although a smaller sum is expressed in figures on the margin of the bill, yet if these be altered and the blank filled in to the full amount covered by the stamp, the acceptor is liable to that amount to a holder in due course. *Garrard v. Lewis*, 10 Q. B. D. 30.

Where an acceptance has been given for valuable consideration with the drawer's name alone in blank, the latter can be added after the death of the acceptor. *Carter v. White*, 20 Ch. D. 225; W. N. 1883, p. 210, C. A.

And it is immaterial that the names of the drawer and indorsee are forgeries or fictitious; *L. & S. W. Bank v. Wentworth*, 5 Ex. D. 96.

But, where A. merely writes a blank acceptance, he will not be liable thereon even at the suit of a *bona fide* holder for value, unless A. issued the acceptance intending it to be filled up so as to become a complete bill. *Bazendale v. Bennett*, 3 Q. B. D. 525, C. A.

It is a material alteration, which avoids the bill, at any rate as between the immediate parties, to insert words before the acceptance making the bill payable at a particular place. *Hanbury v. Lovett*, 18 L. T., N. S. 366, E. T. 1868, Ex. And, it seems that where the holder of a bill, accepted in blank, has taken it from the drawer with knowledge of it having been so accepted, he will have no better title than the drawer had. *Hatch v. Searles*, 2 Sm. & Giff. 147; aff. by L. J., 24 L. J., Ch. 22. See further as to acceptance in blank. *Hogarth v. Latham*, 3 Q. B. D. 643, C. A.

Presentment for payment.] Proof of presentment is necessary against the acceptor on a qualified acceptance, but not on a general acceptance, see *ante*, p. 330, even where the bill is payable on demand. *Rumball v. Ball*, 10 Mod. 38; *Norton v. Ellam*, 2 M. & W. 461. If the bill or note be payable after sight, it must be presented in order to charge the acceptor or maker. *Dixon v. Nuttall*, 1 C. M. & R. 307, and see sect. 54 (1), *ante*, p. 330. But, by sect. 52 (2), *ante*, p. 330, the acceptor is not in general discharged by non-presentation of the bill to him on the day it matures. As to when a bill falls due, *vide ante*, p. 328. By sect. 10 (1) (a), a bill payable *at sight* is payable on demand.

Evidence under money claims.] In an action by payee against acceptor, if the plaintiff be also the drawer, the bill will be evidence of money had and received; *Thompson v. Morgan*, 3 Camp. 101; or, on an account stated; *per* Abbott, C. J., *Rhodes v. Gent*, 5 B. & A. 245; but, not where the payees or holders are third persons. *Semb., Early v. Bowman*, 1 B. & Ad. 889. An acknowledgment of his acceptance by the defendant to the holder is evidence of an account stated between them; *per* Bailey, J., *Leaper v. Tatton*, 16 East, 423; *Highmore v. Primrose*, 5 M. & S. 65.

Acceptance, effect of, in accrediting the drawing.] Sect. 54 (2), *ante*, p. 330, defines the effect of an acceptance in admitting the drawing. For this purpose it matters not that the bill was accepted in blank; *L. & S. W. Bank*

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v. *Wentworth*, 5 Ex. D. 96. So an acceptor for the honour of the drawer is estopped from disputing the drawer's signature. *Phillips v. Im Thurn*, 18 C. B., N. S. 694; L. R., 1 C. P. 463.

Indorsee against Acceptor.

In this action the plaintiff may be put to prove the indorsements alleged, besides the facts required to be proved in an action by the payee.

Indorsement—Statute.] By sect. 2, "Indorsement means an indorsement completed by delivery," *vide* sect. 21, *ante*, p. 321.

Sect. 8. "(1.) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable."

"(2.) A negotiable bill may be payable either to order or to bearer."

"(3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank."

"(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable."

"(5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option."

The rules laid down by the words in italics are new. As to restraining negotiability of bill, *vide* sects. 34 (4) and 36 (1), *post*, p. 337.

Sect. 31. "(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder" (*vide* sect. 2, *ante*, p. 318) "of the bill."

"(2.) A bill payable to bearer" (*vide* sect. 2, *ante*, p. 318) "is negotiated by delivery" (*vide* sect. 21, *ante*, p. 321).

"(3.) A bill payable to order" (*vide* sect. 8 (4), *supra*) "is negotiated by the indorsement of the holder completed by delivery" (*vide* sect. 21, *ante*, p. 321).

"(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor."

"(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability." See sect. 16, *post*, p. 342; and sect. 26, *ante*, p. 326.

Sect. 32. "An indorsement, in order to operate as a negotiation, must comply with the following conditions, namely:—

"(1.) It must be written on the bill itself and be signed by the indorser. The simple signature" (*vide* sect. 91, *ante*, p. 318), "of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognised, is deemed to be written on the bill itself."

"(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill."

"(3.) Where a bill is payable, to the order of two or more payees, or indorsees, who are not partners all must indorse, unless the one indorsing has authority to indorse for the others." In the case of dividend warrants the rule is otherwise, *vide* sect. 97 (3), (d), *ante*, p. 319.

"(4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature."

"(5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved."

"(6.) An indorsement may be made in blank or special." *Vide* sect. 34, *infra*. "It may also contain terms making it restrictive." *Vide* sect. 35, *infra*.

Sect. 34. "(1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer."

"(2.) A special indorsement specifies the person to whom, or to whose order the bill is to be payable."

"(3.) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement." *Vide* sect. 7, *ante*, p. 320, and sect. 8, *ante*, p. 336.

"(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person." *Vide* sect. 8 (3), *ante*, p. 336.

Sect. 35. "(1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D. only,' or 'Pay D. for the account of X.,' or 'Pay D. or order for collection.'"

"(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so."

"(3.) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement."

Sect. 36. "(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed," *vide* sect. 35, *supra*, "or (b) discharged by payment or otherwise." *Vide* sect. 59, *post*, p. 367, sect. 60, *post*, p. 371, and sects. 61, 62, 63, *post*, p. 369.

Sect. 37, *ante*, p. 322, relates to the negotiation of a bill to a party liable thereon.

Sect. 38, *ante*, p. 322, defines the rights and powers of the holder of a bill.

Indorsement, how proved.] It appears from sects. 2, 32 (1), that "indorsement" in general implies the writing of the holder's name on the bill and the delivery thereof to the alleged indorsee as indorsee; "delivery" is defined by sect. 21, *ante*, p. 321. As against the acceptor it is not necessary that the indorser should intend to guarantee the indorsee, if the acceptor make default. See *Denton v. Peters*, L. R., 5 Q. B. 475, 477, and *Smith v. Johnson*, *post*, p. 341. The delivery need not be personal. Thus, if a general agent for the indorsee, being indebted to him, indorse and deposit a bill among other securities of the indorsee in his custody, it is sufficient. *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J., C. P. 160. So, where A. indorsed a bill in blank and delivered it to the plaintiff, the manager of a bank, for value received from the bank, and the plaintiff, by direction of the directors of the bank, sued the acceptor upon it; it was held that those facts proved an indorsement to the plaintiff, inasmuch as an indorsement in blank enables the indorsee to

hand it over and give title to any one to sue. *Law v. Parnell*, 7 C. B., N. S. 282; 29 L. J., C. P. 17; *Ancona v. Marks*, 7 H. & N. 686; 31 L. J., Ex. 163. But, there must be a delivery with intent to transfer the property, and, if the indorsed bill be delivered to an agent for a special purpose only, and he parts with it improperly, this will not be an indorsement except in the hands of a *bond fide* holder for value; *Marston v. Allen*, 8 M. & W. 503; *Barber v. Richards*, 6 Exch. 63; and therefore, where the bill was delivered by such agent to plaintiff when overdue without consideration, it was held no indorsement. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J., Q. B. 1.

An indorsement made in France of a bill drawn, accepted and made payable in England, is good, if made according to English law. *Lebel v. Tucker*, L. R., 3 Q. B. 77. But, the indorsement of a French promissory note must be made according to French law to enable the indorsee to sue in England; *Trimbey v. Vignier*, 1 N. C. 151; so, in the case of a French bill, even though accepted in England. *Bradlaugh v. De Rin*, L. R., 3 C. P. 538. This seems to have been assumed by the Ex. Ch. on appeal in this case, though they reversed the judgment on the ground that the C. P. had proceeded on an erroneous view of the law of France; and the court intimated that the judgment in *Trimbey v. Vignier*, *supra*, was wrong, on the same ground. L. R., 5 C. P. 473.

By sect. 54 (2), *ante*, p. 330, the acceptor is precluded from denying to a holder in due course the capacity of the payee to indorse, but not the genuineness or validity of his indorsement. Thus, where a bill is drawn by a partner in the name of his firm, his authority to indorse is not admitted by acceptance. *Garland v. Jacomb*, L. R., 8 Ex. 216, Ex. Ch. So, where a bill payable to the drawer's own order was drawn and indorsed by procuration by the same person, it was held that the acceptance only admitted the drawing by procuration and not the indorsing. *Robinson v. Yarrow*, 7 Taunt. 455. But, where the drawing and indorsement are both forgeries, and the acceptor, with knowledge of this, negotiates the bills, he cannot dispute the regularity of the indorsement. *Beeman v. Duck*, 11 M. & W. 251. It seems that under the C. L. P. Act, 1854, s. 27, *ante*, p. 132, an indorsement might be proved by comparing it with the drawer's signature, which the acceptor is estopped from denying; and that as an authority to draw bills is some evidence of an authority to indorse also, see *Prescott v. Flinn*, *post*, p. 339, the indorsement might be proved by comparison with the drawer's signature, even when both signatures are *per* procuration.

By sect. 7 (3), *ante*, p. 327, where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, and that he promised to pay it, *Ryder*, O. J., left the case to the jury, who found for the plaintiff, and the court refused a new trial. *Hankey v. Wilson*, Sayer, 223. So, an offer made by the acceptor to pay a bill with certain names on it, is a sufficient admission of the plaintiff's title, so as to supersede the necessity of proof of each person's handwriting. *Bosquet v. Anderson*, 6 Esp. 43. But, where the bill was shown to the defendant with the name of the payee indorsed upon it, and the defendant merely objected to the want of consideration, it was ruled that that did not supersede the necessity of proving the indorser's handwriting. *Duncan v. Scott*, 1 Camp. 101. An admission of his handwriting by the indorser, though evidence against himself, is not evidence of indorsement in an action against the acceptor. *Hemings v. Robinson*, Barnes, 436.

Indorsement by agent.] When the indorsement is by an agent, it is necessary to show that the person by whom the indorsement was written had the

authority of the person whose name is written. In such a case an authority to draw does not of itself import an authority to indorse bills; but it is a fact which ought to go to the jury as evidence. The clerk of the payees of a bill having been accustomed to draw cheques for them, and in one instance authorised to indorse a bill, and two other bills indorsed by him having been discounted at the payee's bankers, and the proceeds received by them, —these facts were held evidence that the clerk had a general authority to indorse. *Prescott v. Flinn*, 9 Bing. 19. A power to A. to indorse and negotiate bills remitted to G., will not authorise the indorsement of a bill remitted to G. for a special purpose, and which G. could not have applied to his own use without fraud; and though the indorsement by G. himself would have transferred a good title to a *bond fide* holder, the indorsement by A. in G.'s name does not. *Fearn v. Filica*, 7 M. & Gr. 513. Where a bill payable to the drawer's order is handed by him to another, for a good consideration, with the intention of transferring the property to him, but the drawer omits to indorse it, the transferee has no authority to indorse by procuration in the drawer's name. *Harrop v. Fisher*, 10 C. B., N. S. 196; 30 L. J., C. P. 283. A farm bailiff, accustomed to pay and receive all moneys for his employer, has no implied authority to draw or indorse bills in the name of his principal. *Davidson v. Stanley*, 2 M. & Gr. 721. Though a wife, who carries on business for her husband, may be presumed to have authority to indorse in his name, yet an indorsement in her own name by a feme covert of a bill payable to her order, formerly conveyed no interest if without her husband's consent; *Barlow v. Bishop*, 1 East, 432; *aliter*, if the indorsement be made with the husband's consent. *Prestwick v. Marshall*, 7 Bing. 565. But under the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1, a married woman can indorse a bill of exchange payable to her. If the maker promise to pay a note, with the indorsement of a married woman upon it, it may be presumed as against him that she had authority from her husband to indorse it in her own name; *Cotes v. Davis*, 1 Camp. 485; recognised in *Prestwick v. Marshall*, *supra*; *Prince v. Brunatle*, 1 N. C. 435; and *Lindus v. Bradwell*, 5 C. B. 583; but, it is to be observed that, as she was the payee, the defendant, as maker, was estopped, without any promise, from disputing her capacity to indorse; see sect. 54 (2) (c), *ante*, p. 330. Where the wife, who managed all the money part of the business, had power to indorse in the husband's name, it may be left to the jury to say whether the power authorised an indorsement by her daughter, in her presence, and by her direction. *Lord v. Hall*, 8 C. B. 627. A power to A. to draw or indorse in B.'s name, may be exercised by a clerk of A. by his direction. *Ex parte Sutton*, 2 Cox, 84, cited *per cur.* in the last case. By sect. 32 (3), *ante*, p. 336, "where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others." A partner has no implied authority to indorse a bill in the name of the partnership as security for his private debt; and the acceptor is not estopped by his acceptance from showing this want of authority. *Garland v. Jacomb*, L. R., 8 Ex. 216, Ex. Ch. On the dissolution of a partnership, a power, given to one of the partners to receive and pay debts, does not authorise him to indorse a bill in the name of the partnership; and, the partnership being dissolved, he has no general authority to do so. *Kilgour v. Finlayson*, 1 H. Bl. 155. But, a retiring partner may orally give his late partners authority to indorse existing securities; and a statement by the ex-partner, that he has left the assets and securities in the hands of the continuing partners and that he has no objection to their using the partnership name, is evidence from which a jury may infer an authority to indorse. *Smith v. Winter*, 4 M. & W. 454.

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Identity of the indorser.] *Vide ante*, pp. 118, 127.

Date of indorsement.] By sect. 36 (4), "except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue." A bill is presumed to be issued when dated. *Anderson v. Weston*, 6 N. C. 296. But the date of an indorsement cannot be inferred from the date of the drawing; and if it be material, plaintiff should be prepared to prove it, either directly or by inference from circumstances. *Ross v. Rowcroft*, 4 Camp. 245. See, however, *Anderson v. Weston*, 6 N. C. 296, *post*, p. 358.

Proof of mesne indorsements.] All the indorsements that have been stated, though unnecessarily, must (if traversed) be proved as against acceptor. *Waynam v. Bend*, 1 Camp. 175. But, an offer by the acceptor to the holder to give another bill was held by *Ld. Ellenborough* an admission of the holder's title, and of the defendant's liability, and so dispensed with proof of the mesne indorsements. *Bosanquet v. Anderson*, 6 Esp. 43. By sect. 8 (4), *ante*, p. 336, where a bill of exchange is not drawn payable to bearer, it now only becomes so when the *last*, or *only* indorsement is in blank; hence it is not, as it formerly was, sufficient to prove an indorsement in blank, if there is a subsequent special indorsement. See *Smith v. Clarke*, Peake, 225; *Walker v. Macdonald*, 2 Exch. 527. In an action by the indorsee of a bill against the acceptor, the first count stated all the indorsements; the second count an indorsement by the payee to the plaintiff; *Abbott, C. J.*, said that all the indorsements must be proved or struck out, though not stated in the declaration; and this need not be done before the trial. *Cocks v. Borrodale*, Chitty on Bills, 9th ed. 642. Indorsements may be struck out even after the bill has been read in evidence and objected to on the ground of the omission to state them in the declaration. *Mayer v. Jadis*, 1 M. & Rob. 247. By striking out intermediate indorsements, the plaintiff loses the security of those indorsers.

Title of the plaintiff as indorsee.] Sects. 21, 29 & 30, *ante*, pp. 321, 322, define the conditions necessary to entitle the plaintiff to sue as indorsee. When a bill is indorsed in blank, possession is sufficient *prima facie* title; and several plaintiffs, suing as indorsees, need not prove that they are in partnership, or, that the bill was indorsed to them jointly. *Ord v. Portal*, 3 Camp. 239; *Rordamz v. Leach*, 1 Stark. 446; *Atwood v. Rattenbury*, 6 B. Moore, 579. But, where it is specially indorsed to a firm, the partnership must be proved to consist of the plaintiffs. 3 Camp. 240, n. Where the plaintiffs sue in a particular capacity, as trustees of a bankrupt, and allege an indorsement to them as such trustees, they must prove that the bills were indorsed to them in that capacity. *Bernasconi v. Argyle, Dk. of*, 3 C. & P. 29. On a traverse of the indorsement to the plaintiff, the defendant may show that the right to sue on it as indorsee is in other persons, and not in the plaintiff, though the indorsement is in blank. *Machell v. Kinnear*, 1 Stark. 499. In that case the plaintiffs were trustees of the estate of H., an insolvent; two of them were partners in the firm of L. & Co., but one was a stranger; the defendant sent the bill indorsed by him in blank to L. & Co., on account of H.'s estate: on objection being taken, *Ld. Ellenborough* held that, on these circumstances being shown, it was necessary for the plaintiffs to show that L. & Co. had transferred the bill to the plaintiffs, or had authorised them to sue. The defendant might also show that, though indorsed in blank, it was never delivered to the plaintiff as indorsee, but only as agent for another; *Adams v. Jones*, 12 Ad. & E. 455; or, had been delivered to the plaintiff on a condition which had not been complied with.

Bell v. Ingestre, Ltd., 12 Q. B. 317. So, on a traverse of a previous indorsement by A. to B., it might have been shown that A. had delivered it to B. as agent only, and B. had indorsed it in fraud of the true owner, with the plaintiff's privity. *Marston v. Allen*, 8 M. & W. 494. Again, where the payee indorsed specially to M., and handed it to him to get discounted, and he indorsed it to plaintiff without value when overdue, it was held on a traverse of the indorsement from the payee to M., that the defendant was entitled to the verdict. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J., Q. B. 1. But, in many of the above cases the defence must now be pleaded specially. See Rules, 1883, O. xix. r. 15, *ante*, p. 283. And, where the plaintiff was a *bond fide* holder for value, on a traverse of the indorsement by A., the payee, to a previous indorser, B., the defendant could not show that A. delivered the bill for a particular purpose, and B. fraudulently negotiated it. *Hayes v. Caulfield*, 5 Q. B. 81. So, where E. indorsed a bill in blank, and delivered it to B. to get discounted, and he deposited it with T. for value received by himself, it was held that this proved an indorsement from E. to T.: *Barber v. Richards*, 6 Exch. 63; 20 L. J., Ex. 135; for, if the holder puts his name on the back of a bill, and delivers it to his agent for a particular purpose, and he delivers it to a third person for value, that is an indorsement from the holder to such third person: *per Parke, B., Ibid.* Nor, is it any answer, on a denial of the indorsement, that it was indorsed to the plaintiff by the directors of a company (intermediate indorsees), who had no authority to indorse; for, it is enough if the indorsement gives a title to the bill, though the company may not be bound by such indorsement. *Smith v. Johnson*, 3 H. & N. 222; 27 L. J., Ex. 363. See also *Denton v. Peters*, L. R., 5 Q. B. 477, 479. An indorsement in blank by the maker of a note, and a delivery by his *executor* to the plaintiff, is no indorsement to the plaintiff so as to give him a title to sue. *Bromage v. Lloyd*, 1 Exch. 32.

Evidence under money claims.] Although an acceptance has been said to be evidence of money had and received by the acceptor to the use of the holder (Bayley on Bills, 6th ed., 363), yet, on principle, it can be available upon the money claims only where there is privity; as, where the parties on the record are immediate parties on the bill, or, there has been a promise to pay, an account actually stated, or, acknowledgment of liability; and, the later authorities are to that effect. *Waynam v. Bend*, 1 Camp. 175; *Eales v. Dicker*, M. & M. 324; and the cases cited, *ante*, p. 335.

Drawer against Acceptor.

When a bill, though not payable to the drawer's own order, has been dishonoured by the acceptor, and taken up by the drawer, he may sue the acceptor; *Simmonds v. Parminter*, 1 Wils. 185; and in such action may be obliged by proper defences to prove, 1. The acceptance, as to proof of which see *ante*, pp. 328, *et seq.*; 2. The presentment to the defendant, as to proof of which see *post*, pp. 342, *et seq.*, and his refusal to pay, which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment; and 3. The return of the bill to, and payment thereof by, the plaintiff. To prove the latter fact, it has been held not sufficient to produce the bill with a general receipt on the back of it from the then holder; for the receipt *prima facie* imports that the bill was paid by the acceptor. *Scholey v. Walsby, Peake*, 25. But, the legitimacy of this last presumption is doubtful; *per cur* in *Phillips v. Warren*, 14 M. & W. 379.

Payee or Indorsee against Drawer.

In an action by the payee or indorsee against the drawer, the plaintiff may have to prove, 1. The drawing of the bill; 2. Presentment to the drawee for acceptance or to acceptor for payment; 3. His default; 4. Due notice to the defendant of the default or dishonour; and 5, in the case of an indorsee, the indorsements, as to proof of which see *ante*, pp. 336, *et seq.*

Drawing—Statute.] By Sect. 55, "(1.) The drawer of a bill by drawing it—(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;"

Sect. 16. "The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1.) Negating or limiting his own liability to the holder":

(2.) Waiving as regards himself some or all of the holder's duties."

By sect. 72 (1), *ante*, p. 323, when a bill is payable abroad, the obligations of the acceptor, and therefore of the drawer and indorsers, are regulated by *lex loci* of performance of contract.

Proof of the drawing.] The drawing of the bill, when traversed, must be proved by evidence of the drawer's handwriting; or, if drawn by the agent, by proving the authority of the agent and his handwriting. A farm bailiff, intrusted to pay and receive money, has not any implied authority to bind his principal by drawing bills; *Davidson v. Stanley*, 2 M. & Gr. 721; and see further as to authority of agent, *ante*, pp. 333, 338. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill. See further, *Proof of acceptance of partners*, *ante*, p. 331. As to proof of partnership, see *post*, *Action for goods sold; delivery to partner*.

Presentment to drawee for acceptance—Statute.] Sect. 39. "(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument."

"(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment."

"(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill."

"(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers."

Sect. 40. "(1.) Subject to the provisions of this Act," *vide* sect. 41 (2), *post*, p. 343, "when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time."

"(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged."

"(3.) In determining what is a reasonable time within the meaning of this

section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case."

Sect. 41. "(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:

- (a.) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:
- (b.) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:
- (c.) Where the drawee is dead presentment may be made to his personal representative:
- (d.) Where the drawee is bankrupt" (*vide* sect. 2, *ante*, p. 318), "presentment may be made to him or to his trustee:
- (e.) Where authorised by agreement or usage, a presentment through the post office is sufficient."

"(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

- (a.) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:
- (b.) Where, after the exercise of reasonable diligence, such presentment cannot be effected:
- (c.) Where although the presentment has been irregular, acceptance has been refused on some other ground."

"(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment."

Sect. 42. "(1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance" (*vide* sect. 48, *post*, p. 346). "If he do not, the holder shall lose his right of recourse against the drawer and indorsers." As to protesting a bill not returned by the drawee, *vide* sect. 51 (8), *post*, p. 352.

Sect. 43. "(1.) A bill is dishonoured by non-acceptance—

- (a.) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act" (*vide* sect. 17 (2), *ante*, p. 329) "is refused or cannot be obtained; or
- (b.) when presentment for acceptance is excused and the bill is not accepted."

"(2.) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary."

Sect. 44. "(1.) The holder of a bill may refuse to take a qualified acceptance" (*vide* sect. 19 (2), *ante*, p. 329), "and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance."

"(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill."

The provisions of this sub-section do not apply to a partial acceptance," (*vide* sect. 19 (2) (b), *ante*, p. 330), "whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

"(3.) When the drawer or indorser of a bill receives notice of a qualified

acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto."

Presentment to drawee for acceptance.] Where a bill, presentment of which for acceptance is not required by sect. 39, *ante*, p. 342, has been presented and acceptance refused, due notice of such refusal must be given; *Blesard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolley*, 1 T. R. 712; and all parties entitled to notice are discharged by want of it; S. CC.; and are not liable on a subsequent refusal of the drawee to pay; *Roscow v. Hardy*, 12 East, 434; and see sect. 42, *ante*, p. 343. But by sect. 48 (1), *post*, p. 346, the drawer is not discharged by want of notice of non-acceptance, as against a subsequent holder in due course. It may be observed that what is said by the drawee on the bill being presented is evidence for the plaintiff of want of assets, but not what passed between the drawee and the holder afterwards. *Prideaux v. Collier*, 2 Stark. 57. The bill must be left with the drawee for 24 hours, unless during that time he either accept or refuse to do so. Bayley on Bills, 6th ed., 184; *Van Dieman's Land, Bank of, v. Victoria, Bank of*, L. R., 3 P. C. 543. The drawee may revoke and cancel his acceptance before he parts with the bill. *Cox v. Troy*, 5 B. & A. 474.

It is not sufficient to show that the bill was presented to some person on the drawee's premises without connecting him with the drawee. *Cheek v. Roper*, 5 Esp. 175.

Where the payee delayed for eight months to present a bill drawn in Calcutta to the drawee at Hong Kong, payable 60 days after sight, the drawer was held discharged; *Mullick v. Radakissen*, 9 Moo. P. C. 46; although no actual loss or damage had been caused by the delay, and the parties to it continued solvent; S. C. The holder may, however, put the bill into circulation without presenting it. *Muilman v. D'Eguino*, 2 H. Bl. 565. And, the question in such cases is, whether, looking at the situation and interests of each holder and drawer, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance or putting it into circulation. *Mellish v. Rawdon*, 9 Bing. 416. In that case a delay of nearly 5 months on a foreign bill was allowed, the exchange having fallen against the plaintiff immediately after the purchase by him of the bill. See also *Chartered Mercantile Bank of India, &c. v. Dickson*, L. R., 3 P. C. 574. With regard to bills payable after sight, drawn by bankers in the country on their correspondents in London: "It does not seem unreasonable," says *Ld. Tenterden*, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay of course cannot be allowed), as part of the circulating medium of the country." *Shute v. Robins*, M. & M. 136.

Presentment for payment.—Statute.] Sect. 45. "Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due," (*vide* sect. 14, *ante*, p. 328).

"(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the indorser liable."

As to when a bill is payable on demand, see sect. 10, *ante*, p. 320.

"In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case."

"(3.) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found."

"(4.) A bill is presented at the proper place:—

(a.) Where a place of payment is specified in the bill and the bill is there presented.

(b.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c.) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(d.) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence."

"(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required."

"(6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all."

"(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found."

"(8.) Where authorised by agreement or usage a presentment through the post office is sufficient."

Sect. 52. "(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it."

By sect. 72 (3), *ante*, p. 323, presentment of a bill payable abroad must be according to the law of the foreign country.

Presentment for payment.] Presentment must be proved, although the acceptor has become bankrupt or insolvent. *Russel v. Langstaffe*, 2 Doug. 514; *Esdaille v. Sowerby*, 11 East, 114. And, where he is dead, it must be made to a personal representative, sect. 45 (7) *supra*; or, if there be none, at the house of the deceased. Molloy, b. 2, c. 10, s. 34; Chitty on Bills, 9th ed., 339. See *Smith v. N. S. Wales, Bank of*, L. R., 4 P. C. 194, 206, 207. But, if the bill be accepted payable at a particular place, a presentment at that place, though the acceptor is dead, is enough to charge the drawer. *Philpott v. Bryant*, 3 C. & P. 244, and see sect. 45 (4, 7), *supra*. Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved. *Philips v. Astling*, 2 Taunt. 206.

A bill, payable at a banker's, must be presented within banking hours; *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28; but, if presented after, and a servant at the banking-house returns for answer "no orders," it is sufficient; *Garnett v. Woodcock*, 6 M. & S. 44; *Henry v. Lee*, 2 Chitty, 124. Presentment at 8 p.m. at the private residence of a merchant is good. *Barclay v. Bailey*, 2 Camp. 527. So, at the place where the bill is made pay-

able (not being the banker's) between 7 and 8 p.m., though no one be there. *Wilkins v. Jadis*, 2 B. & Ad. 188. Presentment to a banker's clerk at the clearing-house is a presentment at the banker's. *Reynolds v. Chettle*, 2 Camp. 596; *Harris v. Packer*, 3 Tyr. 370, n.

∴ Where the bill is directed to a drawee by a certain address and accepted generally, it is enough to present it to an inmate of the house at such address, though the drawee has in the meantime removed. *Buxton v. Jones*, 1 M. & Gr. 83.

Presentment—proof of.] A part payment (*Vaughan v. Fuller*, 2 Stra. 1246) or a promise to pay after the bill is due, is *prima facie* evidence, as an admission, that the bill was duly presented. *Lundie v. Robertson*, 7 East. 231; *Crozon v. Worthen*, 5 M. & W. 5.

Presentment delayed or excused.—Statute.] By sect 46 (1.), "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder" (*vide* sect. 2, *ante*, p. 318), "and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence."

"(2.) Presentment for payment is dispensed with,—

(a.) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b.) Where the drawee is a fictitious person.

(c.) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d.) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e.) By waiver of presentment, express or implied."

Dishonour by non-payment.—Statute.] Sect. 47. "(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid."

"(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."

Vide sects. 65 to 68, *post*, pp. 355, 356, as to acceptance and payment for honour.

Notice of dishonour and effect of non-notice.—Statute.] Sect. 48. "Subject to the provisions of this Act" (*vide* sect. 50, *post*, pp. 348, 353), "when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course," (*vide* sect. 29, *ante*, p. 322), "subsequent to the omission, shall not be prejudiced by the omission."

"(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted."

Payee or Indorsee against Drawer.—Notice of dishonour. 347

Notice of dishonour—when sufficient.—Statute.] Sect. 49. "Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

- "(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment."
- "(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour."
- "(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby."

Notice of dishonour—when sufficient.] Proof of knowledge of dishonour is not equivalent to proof of notice. See *Burgh v. Legge*, 5 M. & W. 418; and *Solarte v. Palmer*, 7 Bing. 530; 1 N. C. 194, D. P.

Repeated calls at the drawer's house without effect are not evidence of notice, but may excuse notice altogether, and should be pleaded in excuse. *Allen v. Edmundson*, 2 Exch. 719.

If the presentment and notice of dishonour, as proved, are sufficient, the allegations in the statement of claim will be amended by the judge at the trial to meet the facts proved; as, where the presentment for payment was stated to have been to the acceptor, and notice of dishonour to the defendant, the judge may amend, by stating—the death of the acceptor, that the defendant was his executor, and a presentment to the defendant for payment; *Caunt v. Thompson*, 7 C. B. 400; or, the claim may be amended by alleging a waiver of notice; *Killby v. Rochussen*, 18 C. B., N. S. 357; *Cordery v. Colville*, 14 C. B., N. S. 374; 32 L. J., C. P. 210. cited *post*, p. 353.

By whom notice should be given.—Statute.] By sect. 49, "(1.) The notice must be given by or on behalf of the holder" (see sect. 2, *ante*, p. 318), "or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill."

"(2.) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party be his principal or not."

"(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given."

"(4.) Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given."

"(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal."

By whom notice should be given.] A bill was drawn by A., indorsed by him to B., and by him to plaintiff, in whose hands it was dishonoured; plaintiff's attorney gave notice of dishonour to A. in due time, either for plaintiff or B., but by mistake stated he applied for payment on behalf of B. (from whom he had no authority), and it was held that the notice was sufficient notwithstanding the misrepresentation. *Harrison v. Ruscoe*, 15 M. & W. 231. And, after a bill has in fact been dishonoured, an unequivocal notice that it has been dishonoured is good, if given by a party to the bill, though he had at the time no certain knowledge of the fact. *Jennings v. Roberts*, 4 E. & B. 615;

24 L. J., Q. B. 102. A notice by the holder's solicitor, not stating on whose behalf the notice is given, is sufficient. *Woodthorpe v. Laves*, 2 M. & W. 109.

To whom notice should be given.—Statute.] By sect. 49, "(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf."

"(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found."

"(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee."

"(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others."

By sub-sects. (3, 4), *ante*, p. 347, notice given by the holder or indorser enures for the benefit of other persons having remedies on the bill.

To whom notice should be given.] Where the drawers are in partnership, a notice to one is notice to all; and therefore where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm. *Porthouse v. Parker*, 1 Camp. 82. But, it seems that notice to a member of a public company or quasi-corporation is not notice to the company. *Steward v. Dunn*, 12 M. & W. 664, *per Parke, B.*; *Powles v. Page*, 3 C. B. 16. The indorser of a dishonoured bill was abroad, but had a house in England, and the bill was shown to his wife there, and payment demanded, and she was also informed of the non-payment: held sufficient. *Cromwell v. Hyson*, 2 Esp. 511; *Houso v. Cowne*, 2 M. & W. 348. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need not prove notice of the dishonour of the substituted bill, the defendant being no party to it. *Bishop v. Rowe*, 3 M. & S. 362. Presentation at the banking-house where a bill is made payable "in need" by the indorsee is not notice of dishonour to the indorsers. *Ex pte. Prange*, L. R., 1 Eq. 1.

Time within which notice must be given.—Statute.] By sect. 49, "(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time unless—

(a.) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b.) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter."

"(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder."

"(14.) Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonour."

Sect. 50. "(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving

notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence."

By sect. 49 (15), *post*, p. 350, delay caused by miscarriage in the post office is excused.

By sect. 92, "Where, by this Act, the time limited for *doing any act or thing* is less than three days, in reckoning time, non-business days are excluded.

"Non-business days for the purposes of this Act mean—

(a.) Sunday, Good Friday, Christmas Day :

(b.) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it :

(c.) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day."

By sect. 72 (3), *ante*, p. 323, the necessity for and sufficiency of a notice of dishonour are determined by the law of the place where the bill is dishonoured.

As to excuse for delay under sect. 50 (1), *ante*, p. 348, on the ground that the holder does not know the address of the drawer or indorser, *vide post*, p. 355.

Time within which notice must be given.] The principle when there are several indorsements is that each indorser has his own day to give notice, but, the holder has not as many days to give notice to the drawer, or prior indorser, as there are intermediate indorsers. He can sue the drawer upon a notice given by the last indorser only if each and every prior indorser has in due time given notice of dishonour to the next preceding indorser. A single default breaks the chain of notices and disqualifies the holder from suing any indorser prior to the defective link, unless a direct and immediate notice has been given by the plaintiff to the person sued. *Rowe v. Tipper*, 13 C.B. 249; 22 L.J., C. P. 135; *Turner v. Leech*, 4 B. & A. 451; *Marsh v. Maxwell*, 2 Camp. 210, n. Where the holder employs a solicitor to ascertain the residence of a prior indorser, the latter has after he has received it a day before giving notice of dishonour. *Firth v. Thrush*, 8 B. & C. 387. When a bill has passed through several branch banks of the same establishment, each is to be considered as a separate party, so as to be entitled to the usual time for giving notice of dishonour, though the bill may have passed by delivery without indorsement; *Clode v. Bayley*, 12 M. & W. 51. So, where, in the ordinary course of business, it has passed through several independent banks. *Prideaux v. Criddle*, L. R., 4 Q. B. 455. It may be observed that the decision of Kindersley, V.-C., in *Ex pte. Prange*, L. R., 1 Eq. 1, is hardly consistent with the above cases.

If the notice of dishonour, sent to the drawer of a bill, arrives too late through misdirection, it is for the jury to say whether the holder used "due diligence" to find the drawer's address; *Siggers v. Brown*, 1 M. & Rob. 520; and, if the delay arose from the bill having been sent to a wrong person through a mistake caused by the indistinctness of the drawer's writing on the bill, he is not discharged; *Hewitt v. Thomson*, *Id.* 543.

Notice, proof of, by admission.] Admission of liability is evidence of notice; as, by a promise to pay; for this admits everything done to entitle the plaintiff to sue; *Lundie v. Robertson*, 7 East, 231; *Croxon v. Worthen*, 5 M. & W. 5; even though it is proved or admitted that notice was not in fact given; *Kilby v. Rochussen*, 18 C. B., N. S. 357. So, a declaration by the defendant made to a party to, but not the holder of the bill, of his intention to pay the bill, "and not to avail himself of the informality of

notice," is evidence of due notice. *Brownell v. Bonney*, 1 Q. B. 39. So, where defendant knew that the bill was unpaid, and only objected to pay it on the ground of fraud in the holder, *Ld. Tenterden*, C. J., held this evidence of due notice. *Wilkins v. Jadis*, 1 M. & Rob. 41. A promise to pay, though conditional as to the mode of payment, is sufficient. *Campbell v. Webster*, 2 C. B. 258. So, where the drawer of a foreign bill, on being told it was dishonoured, said that his affairs are deranged, but that he would be glad to pay it as soon as his accounts with his agents are cleared, this is sufficient proof of a protest having been duly made. *Gibbon v. Coggon*, 2 Camp. 188; *Greenway v. Hindley*, 4 Camp. 52. Where the plaintiff gave in evidence an agreement made between the prior indorser and the defendant (the drawer), after the bill became due, reciting that the defendant had drawn the bill in question, that it was overdue and ought to be in the hands of the prior indorser, and it was agreed that the latter should take the money due to him upon the bill by instalments; this agreement was held to dispense with other proof of notice of dishonour. *Gunson v. Metz*, 1 B. & C. 193. But, a mere offer, upon being arrested, to give another bill, was no evidence of notice. *Cuming v. French*, 2 Camp. 106, n. The drawer of a bill, being applied to for payment, said, "If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first;" the drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor; it was held that this admission, though evidence, was not to be taken as *conclusive* of the defendant's having received, or waived, notice of dishonour of the bill. *Hicks v. Beaufort*, *Dk. of*, 4 N. C. 239.

Notice, proof of delivery of.] By sect. 49, "(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office."

And, when the notice must be given on a certain day, it is enough if the letter be put into the post at such an hour that it would, in the usual course, be delivered on that day; *Stocken v. Collin*, 7 M. & W. 515. The post-mark is not conclusive of the time of posting. *Ibid.* If a notice is sent by post, the direction of the letter will be too general to an indorser, "Mr. H., Bristol." *Walter v. Haymes*, Ry. & M. 149. But, where the bill was dated "Manchester" only, it was held sufficient to direct to the drawer at "Manchester," generally. *Mann v. Moors*, *Id.* 249. So, where a person drew a bill, dating it generally "London," on an acceptor resident in London whose address was stated on the bill, it was held that proof of a letter containing notice of dishonour of the bill having been put into the post-office, addressed generally to the drawer "London," was evidence of due notice of dishonour. *Clarke v. Sharpe*, 3 M. & W. 166. And, in such a case this is enough, as against the drawer, though the letter never reach him, and though his residence might have been found by inquiry at the drawee's address given on the bill. *Burmester v. Barron*, 17 Q. B. 828; 21 L. J., Q. B. 135. For the plaintiff had done all that the drawer himself required, who had supplied no better address; and there was sufficient evidence of due diligence. S. C.; and see *post*, p. 355. Where the plaintiff supplied goods to a company, and took in payment a bill of exchange accepted by the company, and indorsed by the defendant, a director, at the company's office, at which the defendant was in the habit of attending: it was held that notice of dishonour sent to the company's office was sufficient, although the company was then wound up, and the defendant ceased to attend at the office, and did not receive the notice till long after. *Beridge v. Fitzgerald*, L. R., 4 Q. B. 639. If there is no post, the notice may be sent by any ordinary mode of conveyance; as in the case of a foreign

bill, by the first regular ship bound for the place where notice is to be given. *Muilman v. D'Equino*, 2 H. Bl. 565. In proving a notice sent by post, it was ruled by Lord Ellenborough not to be sufficient to show that it was contained in a letter, which letter was put upon the table for the purpose of being carried to the post, and that, in the course of the business, all letters deposited upon that table were carried to the post; but, he said it might have been sufficient had the person, who was in the habit of carrying the letters to the post, been called, and stated that he invariably carried all such letters to the post. *Hetherington v. Kemp*, 4 Camp. 193. And, it was held in *Skilbeck v. Garbett*, 7 Q. B. 846, that if it be shown that the letter was put on the proper day with others in a box in the plaintiff's office, out of which the postman invariably called every day to take the letters, this is evidence of a sending by the post without calling the postman. To prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Tuesday morning, but he had no recollection whether it was put in by himself or another clerk; it was held that this was not sufficient evidence of putting into the post. *Hawkes v. Satter*, 4 Bing. 715. Proof that duplicate notices of dishonour were written; that a letter, of which the witness could not state the contents, was sent on the same day by the plaintiff to the defendant; and that the defendant, having received notice to produce the letter written to him on that day, refused to do so;—was held slight *prima facie* evidence of the receipt of a notice. *Roberts v. Bradshaw*, 1 Stark. 28; see also *Curlewis v. Corfield*, 1 Q. B. 814.

Contents of notice, how proved.] Where a written notice has been given by a letter, a duplicate or copy is good evidence without notice to produce the letter. *Kine v. Beaumont*, 3 B. & B. 288. And, in the case of *Swain v. Lewis*, 2 C. M. & R. 261, it was held, after conference with all the judges, that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange, whether by letter or otherwise. Secondary evidence of such notice is, therefore, admissible without notice to produce. But, where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of *other bills* had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, Abbott, C. J., ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception as to notices respecting bills which are the subject-matter of the action. *Lanauze v. Palmer*, M. & M. 31, *vide ante*, p. 8.

Protest of bill.—Statute.] By sect. 51, "(1.) Where an inland bill "(*vide* sect. 4, *ante*, p. 319) "has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser."

"(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary."

"(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment."

"(4.) Subject to the provisions of this Act "(*vide* sub-sect. (9) and sect. 93, *post*, p. 352), "when a bill is noted or protested, it must be noted on the day of

its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting."

"(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers."

"(6.) A bill must be protested at the place where it is dishonoured: Provided that—

(a.) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(b.) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary."

"(7.) A protest must contain a copy of the bill, and must be signed by the notary" (*vide* sect. 94, *infra*) "making it, and must specify—

(a.) The person at whose request the bill is protested:

(b.) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found."

"(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof."

"(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence."

Sect. 93. "For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting."

Sect. 94. "Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill."

A form is given in Schedule 1 to the Act, which if used is sufficient.

Protest.] In case of an inland bill, a protest is unnecessary and of no effect. *Windle v. Andrews*, 2 B. & A. 696; *Bonar v. Mitchell*, 5 Exch. 415.

In case of a foreign bill, notice of dishonour without notice of protest is sufficient, if the party to whom notice is given resides in this country; *Robins v. Gibson*, 1 M. & S. 288; and it is sufficient, though he should happen at the time of the dishonour to be absent abroad; *Cromwell v. Hynson*, 2 Esp. 511. In giving notice of non-payment to the drawer of a foreign bill resident abroad, it is necessary to give him notice that the bill has been protested; *Robins v. Gibson*, 1 M. & S. 289, *per* Ld. Ellenborough, C. J.; but it is not necessary to send him a copy of the protest. *Goodman v. Harvey*,

4 Ad. & E. 870. So, it was sufficient where the notice stated that the bill "had been duly presented and returned dishonoured." *Ex parte Lowenthal*, L. R., 9 Ch. 591. The production of the protest purporting to be attested by a notary-public, when made abroad, is sufficient proof of the protest. *Anon.*, 12 Mod. 345; Bayley on Bills, 490. But, a notarial protest is no evidence that a foreign bill of exchange has been presented for payment in England; *Chesmer v. Noyes*, 4 Camp. 129; and, a protest made in England, must, it is said, be proved in the ordinary way. Chitty on Bills, 9th ed., 655. But, there is a dictum of Ld. Abinger to the contrary in *Brain v. Preece*, 11 M. & W. 775. In *Geralopulo v. Wieler*, 10 C. B. 690; 20 L. J., C. P. 105, it was held (explaining *Vanderwall v. Tyrrell*, M. & M. 87) that upon payment *supra* protest for the honour of a party, it is enough if, before payment, the bill be in fact protested, and a declaration of payment for honour be made and noted in the notarial register, and that the formal protest may be drawn up afterwards, even after action brought; and, that a duplicate protest made from the notary's book was primary evidence, as much as the protest sent abroad. A promise to pay (though qualified) is an admission by the defendant of due protest for non-acceptance, and notice of it. *Campbell v. Webster*, 2 C. B. 258.

Waiver or dispensation of notice—Statute.] By sect. 50. "(2.) Notice of dishonour is dispensed with—

- (a.) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:
- (b.) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:
- (c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person" (*vide* sect. 2, *ante*, p. 318). "(2) where the drawee is a fictitious person or person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment."

Waiver, or dispensation of notice.] See sect. 50 (2), *supra*. Whenever the want of notice is excused, the circumstances relied upon as the excuse must appear in the statement of claim. See Rules, 1883, App. C., s. 4, No. 6. Therefore, where the defendant told the indorsee beforehand not to send such notice, and that he would pay the amount, this is not evidence to support an averment of notice, but should have been pleaded as a dispensation of it. *Burgh v. Legge*, 5 M. & W. 418. A mere promise to pay made in anticipation that the bill will be dishonoured, does not dispense with notice of dishonour. *Pickin v. Graham*, 1 Cr. & M. 725. But, if the drawer, a few days before the bill becomes due, calls on the holder, and tells him that he has no regular residence, but he will call and see if the bill be paid by the acceptor, this dispenses with notice of dishonour. *Phipson v. Kneller*, 4 Camp. 285. So, if the holder send a dishonoured bill to the place of business of the indorser, for the purpose of giving notice, and find it closed, he can recover against him without having left a notice, as these facts go to prove a dispensation of notice. *Allen v. Edmundson*, 2 Exch. 719; *Crosse v. Smith*, 1 M. & S. 545.

The effect of a promise to pay a dishonoured bill is thus summed up by Byles, J., in *Cordery v. Colville*, 14 C. B., N. S. 374; 32 L. J., C. P. 210, 211. "A promise to pay may operate either as evidence of notice of dishonour,

or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired,—inasmuch as notice may be given at any time within the limit prescribed by law,—a promise to pay is always evidence from which a jury may infer due notice. But even when the other evidence is conclusive to show that due notice was not given, or when a jury refuses to draw the inference that it was given, yet a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice. It is true that a prior dispensation, or subsequent waiver of notice, should be pleaded, but the C. L. P. Act, 1852, s. 222" (and now also Rules, 1883, O. xxviii, r. 1, *ante*, p. 269), "enables and obliges the court to amend the record, whenever an amendment is necessary in order to decide the real question in controversy between the parties. The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour." See also *Woods v. Dean*, 3 B. & S. 101; 32 L. J., Q. B. 1; and *post*, p. 358.

Notice excused; no effects.] By sect. 50, (2)(c)(2), *ante*, p. 353, notice of dishonour is dispensed with where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill. Notice of dishonour to the drawer is unnecessary if he had not, at the time of drawing or before the time of becoming due, any effects either in the hands of the drawee, or consigned on their way to him; *Bickerdike v. Bollman*, 1 T. R. 405; 2 Smith's L. Cases; nor, a reasonable expectation of having any; *Claridge v. Dalton*, 4 M. & S. 226. See *Carew v. Duckworth*, L. R., 4 Ex. 313, cited *post*, p. 372. This excuse must be alleged in the statement of claim; *per Parke, B.*, in *Burgh v. Legge*, 5 M. & W. 421. When issue is joined on the want of effects in the hands of the drawee, the terms of the allegation will sufficiently indicate the required proof. The averment is disproved if it be shown that the drawer had effects on their way to the drawee, though they never reached him. *Rucker v. Hiller*, 3 Camp. 217; 16 East, 43. So, if the drawer had some effects in the drawee's hands at the time when the bill was drawn, though at the time the bill was presented for acceptance and thence until presentment for payment he had not any. *Orr v. Maginnis*, 7 East, 359. So, though there were no effects at the time the bill was drawn or accepted, provided there were effects when it became due; for the whole period must be looked to from the drawing of the bill till it is due; and notice is requisite if the drawee had any effects at any time during that interval. *Hammond v. Dufrene*, 3 Camp. 145; *Thackray v. Blackett*, *Id.* 164. So, if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly beyond that amount. *Blackham v. Doren*, 2 Camp. 503. So, where there is a running account between the drawer and the drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due; *per* Ld. Ellenborough, C. J., *Brown v. Maffey*, 15 East, 221; or, where the bill is drawn in the reasonable expectation that, in the ordinary course of mercantile transactions, it would be accepted or paid; *Claridge v. Dalton*, *supra*; *Lafitte v. Slatter*, 6 Bing. 623; and see *Carew v. Duckworth*, *post*, p. 372; or, where the acceptor has received from the drawer his acceptances upon which he has raised money, and some of which have been dishonoured, and some are outstanding; *Spooner v. Gardiner*, Ry. & M. 84. And, in general, where the drawer would have any remedy over against a third person (as in the case of a bill drawn for the accommodation of a person to whom he indorses it), notice ought to be alleged and proved. *Cory v. Scott*, 3 B. & A. 619; *Norton v. Pickering*, 8 B. & C. 610; *Lafitte v. Slatter*, *supra*; *Turner v. Samson*, 2 Q. B. D. 23, C. A.; *Foster v. Parker*,

2 C. P. D. 18. It is no excuse of notice, that the plaintiff and the defendant are both shareholders in a joint-stock company, and that the defendant drew the bill on the company (the acceptors) in order to raise money for them, and as an additional security to the plaintiff who advanced the money. *Maltass v. Siddle*, 6 C. B., N. S. 494; 28 L. J., C. P. 257.

The fact that the drawer of a bill made it payable at his own house is evidence that the bill is an accommodation bill, and so excuses notice of dishonour. *Sharp v. Bailey*, 9 B. & C. 44.

Notice dispensed with by ignorance of drawer's residence.] Where either want of notice or delay is sought to be excused by the holder's ignorance of the place of residence of the defendant, it is a question for the jury whether he used due diligence to find it; *Bateman v. Joseph*, 12 East, 433; and time may be allowed for inquiries by post; *Baldwin v. Richardson*, 1 B. & C. 245. It is not enough to show that inquiries as to an indorser's residence were made at the place at which the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262. Inquiry should be promptly made of some of the other parties to the bill or note; and of persons of the same name, &c. Bayley on Bills, 6th ed., 281-2; *Chapcott v. Curlewis*, 2 M. & Rob. 484. Where the holder does not know the drawer's residence, notice of dishonour is to be given, not on the day after the bill becomes due, but on the day after that on which the holder after using reasonable diligence is in a position to give the notice. *Gladwell v. Turner*, L. R., 5 Ex. 61, *per* Martin, B.

Calling on the indorser the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, has been considered sufficient. *Browning v. Kinnear*, Gow, 81. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the maker's house for the residence of the defendant, the payee, and indorser. *Sturges v. Derrick*, Wightw. 76.

Where the holder is excused by ignorance from giving notice until after the usual day, the common allegation of notice is still sufficient, if actually given as soon as possible. *Firth v. Thrush*, 8 B. & C. 387. But, generally, excuse of any notice does not prove an averment of notice; *ante*, p. 353.

Account stated.] Where the drawer, knowing the plaintiff to be the indorsee of an overdue bill, promises to pay him it, the plaintiff may recover on an account stated. *Oliver v. Dovatt*, 2 M. & Rob. 230. See *ante*, p. 341.

Payee or indorsee against acceptor supra protest, or for honour.—Statute.] Sect. 15. "The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit."

By sect. 65. "(1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn."

"(2.) A bill may be accepted for honour for part only of the sum for which it is drawn."

"(3.) An acceptance for honour *supra* protest in order to be valid must—
(a.) be written on the bill, and indicate that it is on acceptance for honour :

(b.) be signed by the acceptor for honour:"

"(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer."

"(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour." This provision in italics is new.

Sect. 66. "(1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts."

"(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted."

Sect. 67. "(1.) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need," (*vide* sect. 15, *ante*, p. 355) "it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need."

"(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him."

"(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment." *Vide* sect. 46, *ante*, p. 346.

"(4.) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him."

Sect. 68. "(1.) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn."

"(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference."

"(3.) Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it."

"(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays."

"(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party."

"(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages."

"(7.) Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment."

Sect. 96 repeals stats. 2 & 3 Will. 4, c. 98, and 6 & 7, *Id.* c. 58, and the provisions of those statutes are replaced by the above sections.

As to presentment, *vide ante*, pp. 342, *et seq.*, and as to protest, *vide ante*, p. 352. An acceptor for the honour of the drawer is estopped from

setting up what the drawer himself would be estopped from setting up, and he cannot therefore dispute the drawer's signature. *Phillips v. Im Thurn*, 18 C. B., N. S. 694; L. R., 1 C. P. 463.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove the following matters, if traversed:—1. The indorsement by the defendant; 2. The indorsements between that of the defendant and the plaintiff, when stated in the statement of claim; 3. The presentment to the drawee or acceptor, and the dishonour; 4. Due notice of the dishonour to the defendant.

As to the requisites of a valid indorsement, see sect. 32, *ante*, p. 336. As to indorsement in blank and special indorsement, sect. 34, *ante*, p. 337. As to restrictive indorsement, sect. 35, *ante*, p. 337.

By sect. 2. "Indorsement means an indorsement completed by delivery." By sect. 21 (1), delivery is necessary to complete an indorsement,—as to what amounts to delivery, see sect. 21 (2), *ante*, p. 321.

By sect. 55. "(2.) The indorser of a bill by indorsing it—

(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(b.) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(c.) Is precluded from denying to his immediate or subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

Sect. 56. "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."

Sect. 71. "(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills."

It seems that sect. 56 does not apply to promissory notes, *vide ante*, p. 231.

As between indorsee and indorser, to make a valid indorsement the holder must not only write his name and manually deliver the bill with intent to transfer the property therein, but he must intend to stand in the ordinary position of indorser, and guarantee payment of the bill, if the acceptor make default. *Denton v. Peters*, L. R., 5 Q. B. 475. This defence was held to arise on a traverse of the indorsement. S. C. As to now pleading defence specially, *vide post*, p. 358.

By sect. 20 (1), *ante*, p. 321, a simple signature on blank stamped paper delivered by the signer in order to be converted into a bill, operates as a *prima facie* authority to fill it up to any amount the stamp will cover, using the signature as that of the drawer, or the acceptor, or an indorser. But, if a signature be fraudulently obtained on the back of a bill, without any intention in the writer to indorse the bill, he will not, unless he has been guilty of negligence, be liable as indorser, even at the suit of a *bona fide* holder of the bill; and this defence has held to arise on a traverse of the indorsement. *Foster v. Mackinnon*, L. R., 4 C. P. 704. In this case the indorsement of the defendant, a very old man, was obtained on the back of a bill, which he was induced to sign under the fraudulent misrepresentation that it was a guarantee, and the court held that the defendant was not liable, if he had been guilty of no negligence.

The Rules, 1883, O. xix., r. 15, *ante*, p. 283, would probably now require the defences above stated to be specially pleaded.

By sect. 36 (4), a bill is in general presumed to have been indorsed before it became due. A bill being drawn and endorsed in the name of the firm under which defendant and another carried on business, a question arose whether the indorsement was before or after the dissolution of the partnership had been advertised. The bill was dated before the advertisement, but the indorsement was not dated. Held, that the date was *prima facie* the true date, and that it was properly left to the jury to say whether it was indorsed before or after the advertisement; and that, as it was drawn payable to the defendant's own order, the jury might reasonably infer that it was indorsed shortly after the drawing. *Anderson v. Weston*, 6 N. C. 296. As to indorsement by one of several partners after dissolution, see *ante*, p. 339.

An indorsement in the form, "Pay J. S., or order, value in account with H. C. D.," was, in an action by a subsequent indorsee against the indorser, held not to be a restrictive indorsement; it merely means that value has been received in a certain manner, and has the same effect as if this were stated on the face of the bill. *Buckley v. Jackson*, L. R., 3 Ex. 135.

In suing an indorser on non-payment of the bill by the drawee, it is unnecessary to state an acceptance; and, if stated, it need not be proved. *Tanner v. Bean*, 4 B. & C. 312. It is only necessary to prove a presentment for payment at the place, if any, pointed out in the acceptance. *Parks v. Edge*, 1 Cr. & M. 429. The rules with regard to the presentment of the bill and notice of dishonour are, in general, the same in this action as in an action by the payee against the drawer; see *ante*, pp. 342, *et seq.*

No evidence of a demand upon the drawer, or prior indorsers, is necessary. *Bromley v. Frazier*, 1 Str. 441; *Heylyn v. Adamson*, 2 Burr. 669.

By sect. 50 "(2.) Notice of dishonour is dispensed with." . . .

"(d.) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person" (*vide* sect. 2, *ante*, p. 318) "or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation."

Proof of notice of dishonour will be dispensed with by a promise of the defendant to pay; *Wilkes v. Jacks*, Peake, 202; provided it be an unambiguous one; thus, the following letter from the indorser was held not to waive the proof of notice: "I cannot think of remitting till I receive the draft; therefore if you think proper you may return it to Trevor & Co., if you think me unsafe;" *Borradaile v. Lowe*, 4 Taunt. 93. A promise to pay not made to the plaintiff, but to another person who was holder of the bill at the time, will be sufficient. *Potter v. Rayworth*, 13 East, 417. So, allowing judgment to go by default in an action brought by the then holder of the same bill dispenses with proof of notice of dishonour. *Rabey v. Gilbert*, 6 H. & N. 536; 30 L. J., Ex. 170. And see further, *ante*, pp. 353, *et seq.*, as to what will dispense with proof of notice of dishonour.

By sect. 37, *ante*, p. 322, where a bill is negotiated back to a prior indorser, such person is not in general entitled to enforce payment of the bill against any intervening party to whom he was previously liable. But, circumstances may be specially pleaded, showing that the defendant could not sue the plaintiff on his endorsement. *Wilders v. Stevens*, 15 M. & W. 208; *Wilkinson v. Unwin*, 7 Q. B. D. 636, C. A. And, in an action by indorsee against indorser, where the issue was only on the want of notice to the defendant of non-payment by drawee, defendant was not permitted to show

that the plaintiff (who had given due notice) and the drawer were one and the same person ; the defence should have been specially pleaded. *Williams v. Clarke*, 16 M. & W. 834.

Although a prior indorser is *prima facie* liable to indemnify a subsequent one, yet the whole circumstances of the making, &c., of the note or bill may be referred to in order to show the true relation of the parties *inter se*, and the relative position of the parties may be thereby altered. Thus, where three directors of a company, in order to become sureties for the company to a bank, successively indorsed three notes of the company, it was held that they were not liable to indemnify each other in accordance to the priority of their indorsements, but were only liable to contribute equally *inter se*. *Macdonald v. Whitfield*, 8 Ap. Ca. 733 ; P. C.

Evidence under money claims.] An indorsement is *prima facie* evidence of money lent by the indorsee to his immediate indorser ; *Kessebomer v. Tims*, Bayley on Bills, 6th ed., 363. But, where the indorser told his indorsee, just before presentment, that the bill would not be paid, that notice need not be sent to him, and that he would send the money on a future day, this was held no evidence on an account stated ; it being no proof of a debt due from the indorser at the time of the promise ; but, only a conditional promise in a certain event. *Burgh v. Legge*, 5 M. & W. 418. Though as between indorser and his indorsee the bill is evidence of an account stated, this may be rebutted by showing that the defendant endorsed in blank, and delivered it to F., who carried it to the plaintiff to be discounted. *Burmester v. Hogarth*, 11 M. & W. 97.

Damages Generally.

Statute.] By sect. 57, "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows :

- "(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—
 - (a.) The amount of the bill :
 - (b.) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
 - (c.) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."
- "(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."
- "(3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

The re-exchange is the value of the foreign coin expressed in English money at the rate of exchange on the day of dishonour, see *Suzé v. Pompe*, 8 C. B., N. S. 538 ; 30 L. J., C. P. 75 ; and evidence of custom amongst merchants, giving the holder the option of recovering the sum which he

gave for the bill in England or the re-exchange is not admissible, as it would contradict the obligation implied by the written instrument. S. C. See further as to the right to re-exchange, or to a fixed sum by custom in lieu thereof, *Willans v. Ayers*, 3 Ap. Ca. 133, P. C. As to the mode of calculating interest on bills and notes, see *post*, *Action for interest*.

Defences, generally, to Actions on Bills of Exchange.

By Rules, 1883, O. xxi., r. 2, "in actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact; e.g., the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note." See also O. xix., r. 17, *ante*, p. 283. The proofs required on these traverses have already been considered. The following are some of the most usual defences to actions on bills, not already noticed.

Negotiation of overdue or dishonoured bill.] By sect. 36. "(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title" (*vide* sect. 29 (2), *ante*, p. 322) "affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

"(3.) A bill payable on demand" (*vide* sect. 10, *ante*, p. 320) "is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."

Subject. (3) applies to cheques, sect. 73, *post*, p. 370, but not to promissory notes, sect. 86 (3), *post*, p. 375.

"(4.) Except where an endorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue."

"(5.) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this subsection shall affect the rights of a holder in due course" (*vide* sect. 29, *ante*, p. 322).

In subject. (2) and throughout the Act the term "defect of title" is used as equivalent to an equity attaching to the bill itself. See *Holmes v. Kidd*, 3 H. & N. 891; 28 L. J., Ex. 113, Ex. Ch. But the indorsee taking it overdue does not take it subject to claims arising out of collateral matters; *Burrough v. Moss*, 10 B. & C. 558; *Oulds v. Harrison*, 10 Exch. 572; 24 L. J., Ex. 66. Thus, the indorsee of an overdue bill of exchange is not liable to have a debt due from the drawer to the acceptor set off against his bill. S. C.

Loss of bill.] Unless the loss is specially pleaded, the plaintiff may, after proving the loss, give secondary evidence of the bill. *Blackie v. Pidding*, 6 C. B. 196. See sects. 69, 70, *ante*, p. 324, as to lost bills.

Wrong stamps, &c.] *Vide ante*, pp. 209, 226, 227. By sect. 96 (3) (a), the provisions of the Stamp Acts are not affected by the B. of Ex. Act, 1882.

Alteration.] By sect. 64. "(1.) Where a bill or acceptance is materially altered without the assent of all the parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent,

and the bill is in the hands of a holder in due course" (vide sect. 29, ante, p. 322), "such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

The provision in italics is new.

The defence of alteration under this section arises apart from the objection that a bill altered in any material particular after it has been issued is a fresh instrument and requires a new stamp, as to which *vide ante*, pp. 230, 231, for sect. 97 (3) (a) saves the effect of the Stamp Acts. As to cancellation of acceptance by mistake, *vide* sect. 63 (3), *post*, p. 369.

The alteration is "apparent" if the party liable on the bill can at once discern it on the face of the bill, though it is not obvious to all the world. *Leeds Bank v. Walker*, 11 Q. B. D. 84.

The alteration may be material although the contract is unaffected thereby; in such case it is necessary to inquire what was the object of the part which is altered. *Suffell v. Bank of England*, 9 Q. B. D. 555, C. A. Thus, the number on a Bank of England note has been held to be a material part thereof. S. C.

After a joint and several note, made payable "with lawful interest," had been signed by three makers, two of the makers, with the assent of the plaintiff, the payee and holder, wrote on the left-hand corner of it, "with interest at six per cent.;" held that this avoided it as against the third maker who was sued alone. *Warrington v. Early*, 2 E. & B. 763; 23 L. J., Q. B. 47. So, the addition of a memorandum, which fixes the rate of exchange at which a foreign bill is payable, avoids it. *Hirschfeld v. Smith*, L. R., 1 C. P. 340. And, where the defendant gave a blank acceptance for valuable consideration, it was held that the person to whom it was delivered was only entitled to draw a bill with a general acceptance, and that the insertion of a particular place of payment before the acceptance vitiated the bill, at all events as between the immediate parties. *Hanbury v. Lovett*, 18 L. T., N. S. 366, E. T. 1868, Ex.; see also *Crotty v. Hodges*, *post*, p. 362. So, altering a joint and several note signed by two into a note signed by three, by getting a third maker to join, vitiates the note as against one of the makers who did not assent to the alteration. *Gardner v. Walsh*, 5 E. & B. 83; 24 L. J., Q. B. 285. Where the defendant had paid two years' interest on an altered note, this was held to be evidence that the alteration was by his consent. *Carriss v. Tattersall*, 2 M. & Gr. 890. It is for the party who sues on an instrument evidently altered, to give some evidence to explain the alteration. *Clifford v. Parker*, *Id.* 909. In a suit by drawer against acceptor: Plea, 1, traverse of acceptance; 2, alteration after acceptance; the proof was, that the bill was drawn in France on the defendant in London, and the defendant had expressly accepted the bill for a less sum than in the body of it, and that the sum had been altered accordingly, but by whom or when did not appear: held that plaintiff ought to recover; for it might be presumed that the defendant consented to alter the bill, and *non constat*, but that the alteration was made in France, so as not to require an impressed stamp. *Hamelin v. Bruck*, 9 Q. B. 306. The addition of the words "on demand," to a promissory note which expressed no time for payment, was held to be an immaterial alteration. *Aldous v. Cornwell*, L. R., 3 Q. B. 573. See further in 1 Smith's L. Cases, notes to *Master v. Miller*, and cases cited, *ante*, pp. 230, 231, and 325.

An alteration of such a kind as to discharge the acceptor was formerly admissible in evidence under a traverse of the acceptance; when the bill

was declared on in its altered form. *Hirschman v. Budd*, L. R., 8 Ex. 171 ; following *Cock v. Coxwell*, 2 C. M. & R. 20 ; and overruling *Parry v. Nicholson*, 13 M. & W. 778. Where, however, the instrument was declared on in its unaltered form, or the altered part did not appear in the declaration, it was necessary to plead the alteration specially. *Mason v. Bradley*, 11 M. & W. 590. The defendant authorised W. to put his name to a general acceptance on a blank stamp ; this was done, and on filling the bill up the payee added a place of payment to the acceptance, the bill being declared on without stating the place of payment : on a traverse of the acceptance, the defendant was held entitled to succeed, on the ground apparently that the acceptance never existed on a perfect bill as a general acceptance ; and a special one was not authorised by the defendant. *Crotty v. Hodges*, 4 M. & Gr. 561. And see *Hanbury v. Lovett*, *ante*, p. 361. In all the above cases it would now be necessary to plead the defence specially. Rules, 1883, O. xix., r. 15, *ante*, p. 283.

Where the drawer made an alteration fatal to the bill, as between him and the acceptor, he may recover on a claim for the original consideration ; *Atkinson v. Hawdon*, 2 Ad. & E. 628 ; *aliter*, as between indorsee and drawer, the alteration being made by the former. *Alderson v. Langdale*, 3 B. & Ad. 660. A note so altered as to avoid it, may be used by the payee as evidence of an account stated by the maker at the time it was given. *Gould v. Coombs*, 1 C. B. 543.

Failure or want of consideration.] Sect. 27, *ante*, p. 321, defines valuable consideration for a bill and a holder for value.

Sect. 28. "(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor and for the purpose of lending his name to some other person."

"(2.) An accommodation party is liable on the bill to a holder for value ; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not."

Want of consideration alone is only a defence, when the parties to the action, are the parties as between whom there was the alleged want of consideration, or as between parties who are in privity with them. A *bonâ fide* holder for value is not affected by any want of consideration as between antecedent parties to the bill or note.

Formerly any facts or circumstances which invalidated the original consideration of a bill or note were admitted in support of a general plea of want of consideration ; see *Mills v. Oddy*, 2 C. M. & R. 103, cited *post*, p. 363 ; but it would seem that the facts relied on should now be specially pleaded. Rules, 1883, O. xix., r. 15.

Where a debt is due on a judgment between the parties there is a good consideration ; as the taking the security imports a promise on the part of the judgment debtor to suspend proceedings on the judgment till the maturity of the bill or note ; *Baker v. Walker*, 14 M. & W. 465 ; the same principle applies where there is a debt from a third person to the payee ; *Poplevell v. Wilson*, 1 Str. 264. A solicitor's bill, though not delivered according to law, is a good consideration. *Jeffreys v. Evans*, 14 M. & W. 210. In an action by payee against the acceptor of a bill at 3 months, drawn in consideration of money to be paid in one month by payee to drawer, and accepted for the accommodation of the drawer, if the money be not paid, the consideration fails and the plaintiff cannot recover. *Astley v. Johnson*, 5 H. & N. 137 ; 29 L. J., Ex. 161. A note given by the defendant on the faith of a misrepresentation by the plaintiff of either matter of fact or of law, though made without fraud, may be impeached as for want of consideration. *Southall v. Rigg*, and *Forman v. Wright*, 11 C. B. 481 ; 20 L. J.,

C. P. 145. So, a note given for past gratuitous services, and in consideration for future services, as to which there was no binding contract. *Hulse v. Hulse*, 17 C. B. 711; 25 L. J., C. P. 177. But, the compromise of a claim, made *bond fide*, though unfounded, and known by the defendant to be so, but for which, the claimant threatened to sue, is a good consideration. *Cook v. Wright*, 1 B. & S. 559; 30 L. J., Q. B. 321. See *Wilby v. Elgee*, L. R., 10 C. P. 497, and *Callisher v. Bischoffsheim*, L. R., 5 Q. B. 449, on which however see *Ex parte Banner*, 17 Ch. D. 480, 490, *per Brett*, L. J.

In an action by indorsee against acceptor, it is not even *prima facie* evidence of want of consideration between the defendant and the drawer, to show that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee, and on the understanding that the money should be divided between one of the indorsees and the drawer. *Whitaker v. Edmunds*, 1 Ad. & E. 638. Where the defence to an action on a note states an executory consideration for it, which was never executed, the defendant is not precluded from proving his defence, although the note professes, on the face of it, to be founded on a past consideration. *Abbott v. Hendricks*, 1 M. & Gr. 791. And, generally the consideration or alleged "value received," apparent on the face of a note, may be contradicted, but not the contract or promise itself. *Easter v. Jolly*, 1 C. M. & R. 703; and see *ante*, p. 19.

In general, the declarations of a former holder of a bill are not admissible to prove the want of consideration. *Shaw v. Broom*, 4 D. & Ry. 730. But, where the plaintiff and the party, whose declarations are offered in evidence, are identified in title; as, where the plaintiff took the bill from him after it became due; such declarations are admissible. *Benson v. Marshall*, cited *Id.* 732; *Beauchamp v. Parry*, 1 B. & Ad. 89. So, where the plaintiff, though he did not take the bill after it was due, sues as agent for the party who made the declarations. *Welstead v. Levy*, 1 M. & Rob. 138.

Fraud.] By sect. 29. "(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or, when he negotiates it in breach of faith, or under such circumstances as would amount to a fraud."

"(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course," *vide* sub-sect. (1), *ante*, p. 322, "and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

See hereon observations, *ante*, p. 322.

Fraud, which makes the contract void or voidable as against the defendant, must be specially pleaded. Rules, 1883, O. xix., r. 15, *ante*, p. 283. Formerly, when the effect of the fraud was that the defendant never made the contract sued on, the defence arose on a traverse of the indorsement or acceptance, as the case might be. *Foster v. Mackinnon*, L. R., 4 C. P. 704, *vide ante*, p. 357. So, when the fraud was one which avoided the consideration, it might be given in evidence under a general plea denying the consideration. *Mills v. Oddy*, 2 C. M. & R. 103. But a special defence would be required now, under r. 15, *supra*. The maker of a note pleaded that it was made and delivered to W. only to get it discounted, and that W. fraudulently indorsed it to the plaintiff, who gave no consideration and knew of the fraud: replication *de injuria*; letters written by W., while holder of the note, are not admissible against the plaintiff to prove the fraud, without first establishing, *aliunde*, a privity between the plaintiff and

him. *Phillips v. Cole*, 10 Ad. & E. 106. A knowledge by the plaintiff, indorsee, of fraud in the concoction of a bill, is no defence if he received it for good consideration, from an innocent indorser. *May v. Chapman*, 16 M. & W. 355. As to how far a company are affected by knowledge of their director from whom they have bought bills which had been fraudulently obtained by him, see *Ex parte Oriental Commercial Bank*, L. R., 5 Ch. 358.

The holder without indorsement of a draft payable to order, though taken by him *bond fide* and for value, has no better title than the person from whom he took it; and such holder is affected by fraud, of which he has notice before he obtains the formal indorsement. *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161.

Forgery.] See sect. 24, *ante*, p. 325. Forgery of the defendant's signature is, of course, evidence under a traverse of the making, &c.; but, for the purpose of proving the forgery, the defendant cannot be permitted to prove that other bills, with forged signatures of his, had been in the hands of the plaintiff and circulated by him. *Griffiths v. Payne*, 11 Ad. & E. 131. As to the acknowledgment by the defendant of a forged signature, so as to render himself liable thereon by estoppel or ratification, *vide ante*, p. 334.

Cancellation, so imperfectly effected that the bill is still apparently uncanceled, affords no answer as against a *bond fide* holder. Therefore, where the acceptor of a bill tore it in two for the purpose of destroying it before circulation, and the drawer fraudulently rejoined the pieces, and passed the bill to a *bond fide* holder for value, the acceptor was held liable, whether the fraud amounted to forgery or not. *Ingham v. Primrose*, 7 C. B., N. S. 82; 28 L. J., C. P. 294. The decision in this case was, however, dissented from by Brett, L. J., in *Bazendale v. Bennett*, 3 Q. B. D. 525, 532, 533, C. A. As to the alteration of the figures in the margin of a bill accepted in blank, see *Garrard v. Lewis*, *ante*, p. 335.

Illegality.] See *Defences to Actions on Simple Contracts*,—*Illegality*, *post*. Where a bill has been accepted for good consideration, it seems that in an action against the acceptor, it is no defence that the plaintiff took the bill for illegal consideration. *Flower v. Saddler*, 10 Q. B. D. 572, 575; *per* Brett and Cotton, L. JJ.

Sect. 27, *ante* p. 321, defines valuable consideration and who is a holder for value.

Sect. 30. "(1.) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value."

"(2.) Every holder of a bill is *prima facie* deemed to be a holder in due course" (*vide* sect. 29, *ante*, p. 322); "but, if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

Want of consideration—Onus probandi.] In a case alleged to fall within the latter part of sect. 30 (2), *supra*, the judge is not bound to decide whether fraud has been proved in order to throw this burden on the plaintiff, but only whether is *any* evidence of fraud for the jury. *Harvey v. Towers*, 6 Exch. 656; 20 L. J., Ex. 318; *Berry v. Alderman*, 14 C. B. 95; 23 L. J., C. P. 34. When the plea alleged that the bill was founded on a wager, and that the indorsements were without value, proof of a wager, void but not unlawful, was held to show only want of consideration and not illegality, and to raise no presumption that the plaintiff

was not a *bonâ fide* holder for value ; it lay on the defendant, therefore, to prove this. *Fitch v. Jones*, 5 E. & B. 238 ; 24 L. J., Q. B. 293.

It seems that an admission of fraud or illegality on the record throws on the plaintiff the burthen of proof as to consideration, but, not as to absence of notice of the fraud or illegality, though the reason of the distinction is not very clear. The cases in support of this proposition are collected *ante*, pp. 74, 75, *sub tit. Admissions on the record*.

In *Hogg v. Skeen*, 18 C. B., N. S. 426 ; 34 L. J., C. P. 153, some of the defendants, acceptors, pleaded non-acceptance : held that proof under this issue, that the acceptance was by one of the defendants, who had let judgment go by default, in fraud of the others, his partners, but without showing the plaintiff's privity, obliged the plaintiff to show that he gave value for the bill ; in this case, *Musgrave v. Drake*, 5 Q. B. 185, was distinguished. It would seem that Rules, 1883, O. xix., r. 15, would require this defence to be specially pleaded. A bill was sent to the plaintiff by a clerk with a message, which, if delivered, would have shown that the plaintiff had such notice as would have made him not a *bonâ fide* holder for value ; the bill was delivered, but the clerk was not called, and it was not proved whether the message had been given or not : held, in an action of trover, that the evidence was not sufficient to rebut the presumption that plaintiff was a *bonâ fide* holder. *Middleton v. Barned*, 4 Exch. 241.

Illegality of consideration ; bona fides of holder.] See *Defences in actions on simple contracts—Illegality*, *post*. See sect. 29 (2), *ante*, p. 363, and sect. 30 (2), *ante*, p. 364, and sect. 90, *ante*, p. 318. Where a stolen note was changed by the plaintiff, a money-changer, who had received notices a year previously of this and other stolen notes, and kept such notices filed in his office, but did not examine them, he was held entitled to recover. *Raphael v. Bank of England*, 17 C. B. 161 ; 25 L. J., C. P. 33 ; *Bengal, Bank, of, v. Macleod*, 7 Moo. P. C. 35. Gross negligence may, however, be evidence of *mala fides*, though not equivalent to it. *Goodman v. Harvey*, 4 Ad. & E. 870. Buying the bill at a considerable undervalue, with a wilful avoidance of inquiry about it, may be evidence of notice of fraud in the concoction of the bill. *Jones v. Gordon*, 2 Ap. Ca. 616, D. P.

Where the bill was given for money lost by gaming, or upon an usurious contract, or to secure money paid to induce a bankrupt's creditors to sign his certificate, various statutes made it a void security, even in the hands of a *bonâ fide* holder ; but, by 5 & 6 Will. 4. c. 41, so much of the former statutes as made the securities void was repealed, and it was enacted that they should be deemed to have been given for an illegal consideration. This act (except so much of sects. 1, 2, as relates to stat. 9 Anne, c. 19, which applies to gaming and betting), was repealed by the Stat. Law Rev. Act, 1874 ; its unrepealed provisions do not prevent the payee of a bill of exchange given him in repayment of gaming debts, paid by him at the request of the acceptor, from recovering thereon. *Ex pte. Pyke*, 8 Ch. D. 754, C. A. Before the repeal of 5 & 6 Will. 4, c. 41, the defendant accepted a bill of exchange to secure a loan at usurious interest ; after the repeal, he accepted fresh bills for the amount of the loan and the usurious interest, and it was held (*Martin B., diss.*) that there was good consideration for the new bills. *Flight v. Reed*, 1 H. & C. 703 ; 32 L. J., Ex. 265. In *Rimini v. Van Praagh*, *post*, p. 366, Cockburn, C. J., intimated that the judgment of Martin, B., in this case, was right. Where the defence was usury in the indorsement, the usury must have been proved ; suspicion is not sufficient to put the plaintiff to proof of consideration ; thus, in an action by indorsee against one who had indorsed the bill for the accommodation of the drawer, it was shown that one J., a relation of the plaintiff, got the bill discounted

for the drawer, and although it appeared that usurious discount was deducted by J., it was held that, whatever suspicion there might be against the plaintiff, this did not prove usury as against him. *Bassett v. Dodson*, 10 Bing. 40. The earlier bankruptcy acts are now repealed, and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains no provision avoiding a security given to induce a creditor to forbear opposing the bankrupt; the consideration, however, for such a security is illegal; *vide post*, *Defences to actions on simple contracts—Illegality.—Contract by bankrupt*. See *Rivett v. Van Praagh*, L. R., 8 Q. B. 1.

A promissory note given in consideration of the payee's forbearing to prosecute a charge of misdemeanor against the maker cannot be enforced. *Clubb v. Hutson*, 18 C. B., N. S. 414. See also *Brook v. Hook*, L. R., 6 Ex. 89, *ante*, p. 334.

Mere wagers, not made unlawful by any statutes against gaming, &c. are made void, by 8 & 9 Vict. c. 109, s. 18, which avoids all "contracts made in writing, by way of gaming or wagering." But, the act does not in terms avoid a security given to pay a wager; it would, therefore, be only without consideration. See *Fitch v. Jones*, *ante*, p. 365, and *Beeston v. Beeston*, 1 Ex. D. 13.

On issue taken on a defence that a note was given for an illegal consideration, the plaintiff is not bound to produce the note as part of his own case. *Read v. Gamble*, 10 Ad. & E. 597, n.

By sect. 30 (2), *ante*, p. 364, illegality in the concoction or transfer of a bill, as well as fraud, felony, &c., will, if proved, put the holder on proof of consideration. See cases cited *ante*, pp. 364, 365.

[*Agreement at variance with the bill.*] The terms of a bill or note cannot be varied by oral evidence to contradict it, even as between original or immediate parties to it; yet, a contemporaneous memorandum in writing is admissible for that purpose, whether on the same or a separate paper. *Leeds v. Lancashire*, 2 Camp. 205; *Bowerbank v. Monteiro*, 4 Taunt. 844. The two together may thus form one agreement, and must be treated as such. The defence need not allege that the contemporaneous agreement was in writing. *Young v. Austen*, L. R., 4 C. P. 553; *Corkling v. Massey*, L. R., 8 C. P. 395; but, it will not be proved unless an agreement in writing is given in evidence in support of it at the trial. *Young v. Austen*, *supra*; *Abrey v. Cruz*, L. R., 5 C. P. 37; *Foquet v. Moor*, *infra*. This is not, however, in accordance with what is laid down in the earlier cases, for it was formerly held that the plea must have shown that such contemporaneous agreement was in writing, or it would have been bad on general demurrer: *Canham v. Barry*, 15 C. B. 597; 24 L. J., C. P. 100; *Foquet v. Moor*, 7 Exch. 870, 875; 22 L. J., Ex. 35, 37, *per* Parke, B., and compare *Capner v. Mincher*, 13 M. & W. 704, with *Fryer v. Andrews*, 17 L. J., Ex. 25; if, moreover, the plaintiff took issue on a plea, which did not state that the agreement was in writing, the defendant formerly might at the trial have proved the plea by showing an oral agreement; *Capner v. Mincher*, *supra*.

In order that the agreement and promissory note may form one agreement, the agreement or memorandum must be between the same parties, and not merely collateral. Thus, in a suit by payee against maker, it is no answer that by an independent contemporary written agreement between the plaintiff on one side, and the defendant and others on the other side, it was agreed that the note should not be payable except in a certain contingency. *Webb v. Spicer*, 13 Q. B. 894; 3 H. L. C. 510. Where a plea alleged a subsequent agreement to vary an agreement founded on a bill, it could be supported only by proof of an agreement between the parties to the bill. *McManus v. Bark*, L. R., 5 Ex. 65.

Payment.] Sect. 33. "Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not."

Sect. 59. "(1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

'Payment in due course' means payment made at or after the maturity of the bill to the holder thereof in good faith" (*vide* sect. 90, *ante*, p. 318) "and without notice that his title to the bill is defective."

"(2.) Subject to the provisions herein-after contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a.) When a bill payable to, or to the order of a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b.) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill."

"(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged."

See sect. 60, *post*, p. 371, as to the payment by the banker on whom it is drawn, of a bill payable on demand.

Sect. 71. (3.), *ante*, p. 323, relates to the payment of bills drawn in sets.

"(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof."

"(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged."

Payment or satisfaction must be specially pleaded. For presumptive evidence in support of such plea see the cases cited *ante*, pp. 35, 36. Payment of the exact sum due on a note by the defendant in full satisfaction of debt and damages is sufficient, and entitles the defendant to a verdict, and the jury are not bound to give interest, or even nominal damages, for the detention of the debt. *Beaumont v. Greathead*, 2 C. B. 494. This was an action of debt; but in an action by indorsee against acceptor, a plea, *puis darrein continuance*, that an earlier indorser had paid to plaintiff, then the holder, who accepted the full amount of the bill, and also interest thereon, in full satisfaction of the bill, and all moneys due in respect thereof, not mentioning damages or costs, was bad. *Goodwin v. Cremer*, 18 Q. B. 757; 22 L. J., Q. B. 30; see also *Ash v. Pouppeville*, L. R., 3 Q. B. 86. Satisfaction to one of several partners is a satisfaction to all. *Jacaud v. French*, 12 East, 317. And, payment by one, not sued, of several joint and several makers, is payment by the defendant. *Beaumont v. Greathead*, *supra*. So, renewal of a joint and several note by one of the makers, and payment of such renewed note, is payment by all of the first note. *Thorne v. Smith*, 10 C. B. 659; 20 L. J., C. P. 71. But, the mere acceptance by the payee, from one of two joint and several makers of a note, of a mortgage and covenant to pay the amount of the note, is no defence to an action against the other; for the securities are not co-extensive; and proof that the mortgage was given to secure the same debt does not prove that it was accepted in lieu and satisfaction of the note. *Ansell v. Baker*, 15 Q. B. 20.

A judgment and execution, without satisfaction, against a subsequent party to a bill, will be no discharge of a prior party; it is only an extin-

guishment between the parties to the judgment. *Hayling v. Mullhall*, 2 W. Bl. 1235 ; as explained in *English v. Darley*, 2 B. & P. 62. So, the acceptor was liable at the suit of an indorsee, although judgment had been obtained against the acceptor on the bill at the suit of a subsequent indorsee, and he had been taken in execution on that judgment. *Woodward v. Pell*, L. R., 4 Q. B. 55. But, a composition with the acceptor, and the taking of a third person's note as a security for it, operates as a satisfaction of the bill. *English v. Darley*, *supra* ; *Lewis v. Jones*, 4 B. & C. 506. Where the plaintiff paid money to A. for a bill accepted by a third party and indorsed in blank ; the plaintiff intending to buy the bill and be the holder thereof, and A. believing he was paying the amount for the acceptor ; the court held, that if the plaintiff did not make the payment in order to discharge the acceptor, nor by his expressions and conduct led A. so to suppose, he might recover on the bill. *Lyon v. Maxwell*, 18 L. T., N. S. 28 ; Ex. H. T. 1868. Where the first bill is "renewed" by a second, no action can be maintained during the currency of the latter. *Kendrick v. Lomax*, 2 C. & J. 405. But, where the plaintiff held a bill accepted by defendant, who, when it became due, asked for time, and three months afterwards gave plaintiff another bill for the same amount, plaintiff telling him at the same time that something was due for interest, and continuing to hold the first bill ; and the second bill was paid after it became due ; it was held that the plaintiff was entitled to sue on the first bill to recover the interest. *Lumley v. Musgrave*, 4 N. C. 9. Where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a partnership debt on two bills of exchange drawn by them, and the owner consented to take the separate notes of the one partner for the amount, *reserving his right against all three*, and retaining possession of the original bills ; it was held that, the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking of the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin*, 2 B. & A. 210. So, where, on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first ; and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff ; it was held that the second bill was merely a collateral security, and that the receipt of it by the payee did not exonerate the drawer of the first. *Pring v. Clarkson*, 1 B. & C. 14 ; see also *Adams v. Bingley*, 1 M. & W. 192.

The principle of sect. 59 (2), *ante*, p. 367, applies to a part payment, and to cases in which the bill is not strictly an accommodation bill ; *Cook v. Lister*, 13 C. B., N. S. 543 ; 32 L. J., C. P. 121. But, where an accommodation acceptor pleaded payment by the drawer in an action by an indorsee, proof that the drawer had handed a forged acceptance to the indorsee for the purpose of retiring the outstanding bill, and that the indorsee, being his banker, had credited the drawer for the amount in his banking account, was held insufficient to prove payment, the forged acceptance being, in fact, no payment at all. *Bell v. Buckley*, 11 Exch. 631 ; 25 L. J., Ex. 163. Payment by drawer, who is also payee, to the plaintiff himself, his indorsee, is no answer to an action against the acceptor for value, if the bill was left in the plaintiff's hand, to sue on it as trustee for the drawer ; *Williams v. James*, 15 Q. B. 498 ; 19 L. J., Q. B. 445 ; nor, if he sue against the will of the drawer ; *Jones v. Broadhurst*, 9 C. B. 173. If the acceptor discount his own acceptance for the drawer, this is not payment so as to bar an action on the bill against the drawer by a *bond fide* indorsee for value, who has taken under an indorsement by the acceptor. *Attenborough v. Mackenzie*, 25 L. J.

Ex. 224. "Retiring" a bill by acceptor is equivalent to payment, and stops the circulation; but retiring by an indorser only takes it out of circulation as regards himself, and he retains the same remedies as if he had paid his indorsee in due course. *Elsam v. Denny*, 15 C. B. 87; 23 L. J., C. P. 190.

On a defence of payment, neither the plaintiff nor the defendant is bound to produce the security; and where a plea stated, by way of introduction to an allegation of payment, that the note was given in lieu of a former one, and the plaintiff replied *de injuriâ* generally, it was held enough to show payment without proving the superfluous introductory statement. *Shearn v. Burnard*, 10 Ad. & E. 593. But, if on a special defence of satisfaction, it becomes necessary for the defendant to prove the bill or note, he cannot give secondary evidence of it without having given notice to produce it. *Goodered v. Armour*, 3 Q. B. 956.

By sect. 24, *ante*, p. 325, a person claiming under a forged indorsement cannot give a discharge for the bill, except under sect. 60, *post*, p. 371, in the case of a banker.

Voluntary discharge and waiver.] Sect. 61. "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged."

Sect. 62. "(1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged."

The renunciation must be in writing, unless the bill is delivered up to the acceptor."

"(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

Sect. 63. "(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged."

"(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged."

"(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority."

The provision in sect. 62 (1), as to the renunciation being in writing is new.

The renunciation must be unequivocal:—Thus, a declaration by the holder, that "he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill," will not be sufficient to discharge the acceptor; *Parker v. Leigh*, 2 Stark. 228; *Adams v. Gregg*, *Id.* 531.

Alteration of the position of the parties, giving time, &c.] Giving time to or releasing a principal discharges a surety, *vide post*, p. 434; and therefore giving time to the acceptor discharges the drawer and indorsers. *English v. Darley*, 2 B. & P. 61. So, giving time to any prior party discharges subsequent ones. *Hall v. Cole*, 4 Ad. & E. 577. This defence must be pleaded specially; so that the pleadings on the record sufficiently apprise the parties of the nature of the requisite proofs. There must be a binding agreement

founded on a good consideration, on which an action would lie, if broken. *Moss v. Hall*, 5 Exch. 46. Forbearance to sue the acceptor is not of itself equivalent to giving time. *Walwyn v. St. Quintin*, 1 B. & P. 652; *English v. Darley*, *ante*, p. 369; *Price v. Kirkham*, 3 H. & C. 437; 34 L. J., Ex. 35. An agreement between the plaintiff and a stranger to give time to the acceptor, will not discharge an indorser, unless the acceptor, the principal debtor, was party to the agreement. *Lyon v. Holt*, 5 M. & W. 250; *Fraser v. Jordan*, 8 E. & B. 303; 26 L. J., Q. B. 288. Taking a *cognovit* from the acceptor, after action brought, by which the time of obtaining judgment against him is not deferred, is not a giving of time. *Jay v. Warren*, 1 C. & P. 532; *Lee v. Levy*, 4 B. & C. 390.

It is a good equitable defence, that the defendant made the note jointly with A. as surety only for him, of which the plaintiff had notice at the time and that the plaintiff gave time to A. without the defendant's knowledge, *Pooley v. Harradine*, 7 E. & B. 431; 26 L. J., Q. B. 156; *Taylor v. Burgess*, 5 H. & N. 1; 29 L. J., Ex. 7; *Greenough v. M'Clelland*, 30 L. J., Q. B. 15, Ex. Ch.; even though, although the plaintiff knew the defendant was only surety, he did not agree, nor, did the defendant stipulate, that he should be treated by the plaintiff as surety only, or otherwise than as a maker of the note. S. C. So, in equity, giving time to the drawer or indorser of an accommodation acceptance, with notice that it is such, releases the acceptor; *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J., Q. B. 41; *Edwin v. Lancaster*, 6 B. & S. 571. It is sufficient if the plaintiff knew the position of the defendant, before time is given, though he did not know it at the time of the contract. *Oriental Financial Corporation v. Overend, Gurney, & Co.*, L. R., 7 Ch. 142; L. R., 7 H. L. 348.

If, however, the agreement for giving time to or releasing the principal is qualified by a reservation of remedies against the surety, the surety is not discharged. *Bateson v. Gosling*, L. R., 7 C. P. 9; *Muir v. Crawford*, L. R., 2 H. L. Sc. 456; and cases cited *post*, p. 435.

The indorser of a bill of exchange who has paid it at maturity is entitled to the benefit of any securities deposited to secure the payment thereof by prior parties thereto. *Duncan v. N. & S. Wales Bank*, 6 Ap. Ca. 1, D. P. *Vide post*, p. 435.

ACTION ON CHEQUES.

Statute.] The general provisions of the B. of Ex. Act, 1882, relating to cheques are as follows:—

Sect. 73. "A cheque is a bill of exchange drawn on a banker," (*vide* sect. 2, *ante*, p. 318), "payable on demand."

"Except as otherwise provided in this Part," (*i. e.* Part III. comprising sects. 73 to 82), "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

These provisions of the Act will be found under appropriate headings, *ante*, pp. 318 to 369.

74. "Subject to the provisions of this Act—

- (1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid."

"(2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case."

"(3.) *The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.*"

Sect. 75. "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1.) Countersand of payment :

(2.) Notice of the customer's death."

Sect. 60. "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by, or under, the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

This section is somewhat wider in its terms than the stat. 16 & 17 Vict. c. 59, s. 19, which, however, extends "any draft or order drawn upon a banker for a sum of money payable to order on demand." It applies to bankers only. *Halifax Union v. Wheelwright*, L. R., 10 Ex. 183. An indorsement "*per proc.*" or "as agent" is within it. *Charles v. Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151, C. A. It protects only the banker on whom the cheque is drawn, and the drawer may, in an action for money had and received, recover the amount of the cheque from any person who has obtained payment thereof, through a forged endorsement. *Ogden v. Benas*, L. R., 9 C. P. 513; *Bobbett v. Pinkett*, 1 Ex. D. 368. So, might the owner of a cheque; even against a banker, who had received the money for a customer. *Arnold v. Cheque Bank*, 1 C. P. D. 579. These cases, decided on 16 & 17 Vict. c. 59, s. 19, are applicable to the B. of Ex. Act, 1882, s. 60, *supra*. Now, however, where the cheque is crossed, sect. 82, *post*, p. 374, "a banker who has in good faith and without any negligence received payment for a customer." *Matthiessen v. L. & County Bank*, 5 C. P. D. 7, decided on 39 & 40 Vict. c. 81, s. 12.

There is now no restriction on the amount for which a cheque can be drawn; the stat. 23 & 24 Vict. c. 111, s. 19 is repealed by the B. of Ex. Act, 1882, s. 96.

It is not now illegal to post-date a cheque, whether payable to bearer or order; *vide ante*, p. 224; but a partner in a non-trading firm cannot bind his firm by drawing a post-dated cheque, in the name of the firm. *Forster v. Mackreth*, L. R., 2 Ex. 163. It may be mentioned that the drawer thereof is under no obligation for the benefit of a third person to stop its payment before it is due. *Ex pte. Richdale*, *post*, p. 372. As to a banker's liability with respect to post-dated cheques, *vide post*, p. 373.

As to effect of taking an overdue cheque, see sect. 36 (2, 3), *ante*, p. 360. See also *L. & County Bank v. Grooms*, 8 Q. B. D. 288.

Payee, bearer, or indorsee, against drawer.] The plaintiff may be put to prove the drawing and the presentment to, and non-payment by, the banker, and also notice to the drawer of the non-payment, unless the facts excuse such notice. The evidence necessary in support of the plaintiff's case will be gathered from what has been said under the head of *Bills of exchange*, *ante*, pp. 342, *et seq.*

A banker who has carried to the credit of his customer's account the amount of a cheque handed to him for that purpose becomes a holder thereof for value, and may sue the drawer thereon, whether the account

is overdrawn; *Currie v. Misa*, L. R., 10 Ex. 153, Ex. Ch.; affirmed, on another ground, in D. P., 1 Ap. Ca. 554; *M'Lean v. Clydesdale Banking Co.*, W. N. 1883, p. 184, D. P.; or not; *Ex pte. Richdale*, 19 Ch. D. 409, C. A.

Sect. 45 (2), *ante*, p. 344, provides that presentment must be within a reasonable time after issue, having regard to the usage of trade and particular circumstances.

As between holder and drawer mere delay in presenting for payment, short of six years, is no answer, unless the defendant has been prejudiced by it; as by the failure of the bank after the drawing of the cheque. *Robinson v. Haicksford*, 9 Q. B. 52; *Lawes v. Rand*, 3 C. B., N. S. 442; 27 L. J., C. P. 76. In which case the drawer is released from liability; sect. 74 (1), *ante*, p. 370. The reasonable time under sects. 74 (1, 2), *ante*, pp. 370, 371, for presentation in order to avoid this risk, is the day following the day of receipt. *Moule v. Brown*, 4 N. C. 266; *Alexander v. Burchfield*, 7 M. & Gr. 1061. But, if the holder of the cheque does not live in the same place with the drawee, he may send it to his banker or other agent by the post of the next day after he received it, and the agent should present it not later than the day after he received it; *Rickford v. Ridge*, 2 Camp. 537; *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302; *Prideaux v. Criddle*, L. R., 4 Q. B. 455; and this holds good as between banker and customer; S. CC.; *Bailey v. Bodenham*, 16 C. B., N. S. 288; 33 L. J., C. P. 252.

The process of presenting cheques through the banker's clearing house, is described in the special verdict, in *Warwick v. Rogers*, 5 M. & Gr. 340, 348. Such presentment has been held to be good, *vide ante*, p. 346. Presentment of a cheque to a banker through the post is a proper mode of presentment. *Heywood v. Pickering*, L. R., 9 Q. B. 428, following *Prideaux v. Criddle*, L. R., 4 Q. B. 455, 461. If so presented and the banker delay to return the cheque, or to remit the money, any loss thereby occasioned will, as between the holder and the drawer, fall on the latter. *Heywood v. Pickering*, *supra*.

By sect. 50 (2) (c), (4), *ante*, p. 353, notice of dishonour is excused where the banker is as between himself and the drawer under no obligation to pay the cheque, or (5), where the drawer has countermanded payment. See *Carew v. Duckworth*, L. R., 4 Ex. 313.

A person taking a cheque payable to order, but without indorsement, has no better title than the person from whom he took it, although he took it *bond fide* and without notice; and he is affected by that person's fraud, of which he had notice before he obtained a formal indorsement. *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161. See sect. 31, *ante*, p. 336, and sect. 29, *ante*, p. 322.

Indorsee against Indorser.] Where the cheque has been indorsed, and the indorser is sued by the holder, the plaintiff is bound to show due diligence in endeavouring to obtain payment, and giving notice of non-payment to the defendant. By sect. 45 (2), *ante*, p. 344, the cheque must be presented within a reasonable time or the indorser will be discharged. As to reasonable time, see *Moule v. Brown*, *supra*; and cases cited, *ante*, p. 344.

By sect. 56, "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." As to a holder in due course, see sect. 29, *ante*, p. 322.

Banker's liability on cheques.] Although by sect. 53 (1), *ante*, p. 323, "a bill of itself does not operate as an assignment of funds in the hands of the drawer available for payment thereof, and the drawee of a bill who does not accept as required by this Act, is not liable" thereon, yet there is an implied contract by a banker with his customer to cash cheques within a

reasonable time after he has effects; *Marzetti v. Williams*, 1 B. & Ad. 415; and the customer, if a trader, is entitled to temperate damages on his cheque being, under such circumstances, dishonoured, without showing special damage; *Rolin v. Steward*, 14 C. B. 595; 23 L. J., C. P. 148; and, a banker having been in the habit of cashing cheques of the plaintiff when there were securities of his at the bank, though the cash balance was against him, was held liable for dishonouring cheques under similar circumstances; *Cumming v. Shand*, 5 H. & N. 95; 29 L. J., Ex. 129. So, where the customer placed in his bankers' hands a sum to meet a particular bill, and the bankers, instead of meeting the bill, placed it to the credit of an overdrawn account, it was held that the bankers were liable for the amount of the bill. *Hill v. Smith*, 12 M. & W. 618. But, the bankers may, unless they have agreed otherwise, without notice to their customer, combine accounts he has with several branches of the bank, and dishonour his cheques, if on the whole state of account he have not sufficient assets; *Garnett v. McKewan*, L. R., 8 Ex. 10: for such branches form but one bank; *Prince v. Oriental Bank Cor.*, 3 Ap. Ca. 325, P. C.; except for the purpose of honouring cheques drawn on a particular branch; *Woodland v. Fear*, 7 E. & B. 519; 26 L. J., Q. B. 202; and, of calculating the time for giving notice of dishonour. *Clode v. Bayley*, 12 M. & W. 51, ante, p. 349.

A customer is bound by the custom of bankers. *Emanuel v. Roberts*, 9 B. & S. 121. In this case, bankers were, on this ground, held justified in dishonouring a cheque which had been previously presented at the bank before it was due, and then marked "post-dated" by them. In consequence, however, of the repeal of the enactments prohibiting the post-dating of cheques (*vide ante*, p. 224) this custom no longer exists, and a banker will now pay a cheque, although it has been marked "post-dated."

Crossed Cheques.—Statute.] Sect. 76. (1) "Where a cheque bears across its face an addition of—

- (a.) The words 'and company' or any abbreviation thereof between two parallel transverse lines, either with or without the words 'not negotiable;' or
- (b.) Two parallel transverse lines simply, either with or without the words 'not negotiable;'

that addition constitutes a crossing, and the cheque is crossed generally."

"(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially, and to that banker."

Sect. 77. (1.) "A cheque may be crossed generally or specially by the drawer."

"(2.) Where a cheque is uncrossed, the holder may cross it generally or specially."

"(3.) Where a cheque is crossed generally the holder may cross it specially."

"(4.) Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable.'"

"(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection."

"(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

Sect. 78. "A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing."

Sect. 79. "(1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment thereof."

(2.) Where the banker on whom a cheque is drawn which is so crossed, nevertheless pays the same, or pays a cheque crossed generally, otherwise than to a banker, or if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection, being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to, or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith, and without negligence shall not be responsible, or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be."

Sect. 80. "Where the banker, on whom a crossed cheque" (*vide* sect. 77, *ante*, p. 373) "is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

Sect. 81. "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

Sect. 82. "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Sect. 95. "The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend."

The above sections replace the Crossed Cheques Act, 1876, 39 & 40 Vict., c. 81, which was in very similar terms.

By the Revenue Act, 1883, 46 & 47 Vict. c. 55, s. 17, the above sections, 76-82, "shall extend to any document, issued by a customer of any banker, and intended to enable any person or body corporate, to obtain payment from such banker, of the sum mentioned in such document, and shall so extend, in like manner, as if the said document were a cheque;" it does not, however, "render such document a negotiable instrument." It applies to such documents drawn on the Paymaster-General by public officers.

As the crossing is by sect. 78, *ante*, p. 373, a material part of the cheque, any alteration thereof will in general (see sect. 64 (1), *ante*, p. 360) avoid the cheque.

The above sections do not affect the negotiability of a cheque, whether crossed *generally* or *specially*, unless also marked "not negotiable." See *Smith v. Union Bank of London*, L. R., 10 C. P. 291; 1 Q. B. D. 31, C. A. Hence, it seems that the *bond fide* holder for value of a cheque crossed only, without the addition of the words "not negotiable," is the *true owner* thereof, to whom the banker paying the cheque otherwise than as directed by the crossing is liable under sect. 79 (2), *supra*, and, that the payee or other person who was formerly holder, but lost the cheque while in a negotiable state, has

no remedy given him by the section. See S. C. If, however, the cheque is also marked "not negotiable," then, although it continues to be *transferable* so that the holder for the time being can sue thereon, yet by sect. 81 the holder can have no better title than his transferor had. A banker, however, who *bond fide* and without negligence collects such a cheque for a customer, is protected by sect. 82. See *Matthiessen v. L. & County Bank*, 5 C. P. D. 7, decided on 39 & 40 Vict. c. 81, s. 12. The drawer of a cheque may ratify the payment made by his banker to a banker other than the one named in the crossing, and thereby make the payment a good payment by himself to the holder. *Bobbett v. Pinkett*, 1 Ex. D. 368.

Defences generally to Actions on Cheques.

Vide ante, p. 360.

ACTION ON PROMISSORY NOTES.

Statute.] The general provisions of the Bill of Ex. Act, 1882, relating to promissory notes are as follows :—

By sect. 83. "(1.) A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

"(2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker."

"(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof."

"(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note."

Sect. 84. "A promissory note is inchoate and incomplete until delivery," *vide* sects. 2, 21, *ante*, pp. 318, 321, "thereof to the payee or bearer."

Sect. 85. "(1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenour."

"(2.) Where a note runs 'I promise to pay' and is signed by two or more persons it is deemed to be their joint and several note."

Sect. 86. "(1.) Where a note payable on demand" (*vide* sect. 10, *ante*, p. 320) "has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged."

"(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case."

"(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue."

Sect. 89. "(1.) Subject to the provisions in this Part," (*i.e.* Part IV., comprising sects. 83 to 89) "and, except as by this section provided, the provisions of this Act" (sects. 1-72, *vide ante*, pp. 318-369), "relating to bills of exchange apply, with the necessary modifications, to promissory notes."

"(2.) In applying those provisions, the maker of a note, shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note, shall be deemed to correspond with the drawer of an accepted bill, payable to drawer's order."

"(3.) The following provisions as to bills do not apply to notes; namely, provisions relating thereto—

- (a.) Presentment for acceptance ;
- (b.) Acceptance ;
- (c.) Acceptance *supra* protest ;
- (d.) Bills in a set."

"(4.) Where a foreign note is dishonoured protest thereof is unnecessary."

Sect. 91 (2), *ante*, p. 318, enables, but does not require a corporation to make a note under its common seal.

Sect. 86 (3), *ante*, p. 375, prevents sect. 36 (3), *ante*, p. 360, from applying to notes. It seems that by reason of the Stamp Acts (see sect. 97, *ante*, p. 319), sect. 56, *ante*, p. 357, does not apply to notes, *vide ante*, p. 231.

It follows from sect. 89, *ante*, p. 375, that the decisions on the corresponding sections relating to bills of exchange will apply to notes, *vide ante*, pp. 318-369.

Bank notes—Amount of note.] The acts relating to the issue of promissory notes payable to bearer on demand, or bank notes, are cited under *Stamps—Bank notes*, *ante*, p. 224. Such notes must not be for less than 5*l.*, stat. 7 Geo. 4, c. 6, s. 3. Other restrictions were placed by stats. 48 Geo. 3, c. 88, s. 2, and 17 Geo. 3, c. 30, s. 1, but these are now repealed by the B. of Ex. Act, 1882, s. 96.

The plaintiff must be the holder of the note. Where a note was deposited with a stakeholder for the payee, and the stakeholder has refused to hand it over, the payee cannot sue on the note as holder. *Latter v. White*, L. R. 5 H. L. 578.

Payee against Maker.

Liability of Maker.] Sect. 88. "The maker of a promissory note by making it—

- (1.) Engages that he will pay it according to its tenour ;
- (2.) Is precluded from denying to a holder in due course " (*vide* sect. 29, *ante*, p. 322), "the existence of the payee and his then capacity to indorse."

Proof of making the note.] The making of the note is proved by proving the handwriting of the defendant ; or, if made by an agent, by proof of the handwriting and authority of such agent. An admission by the defendant that the handwriting is his, will be sufficient proof, though it was made pending a treaty for a compromise. *Waldrige v. Kennison*, 1 Esp. 143. An offer on the part of the defendant, after the note has become due, to give another note to the plaintiff instead of it, is an admission of the plaintiff's title. *Bosanquet v. Anderson*, 6 Esp. 43. An admission of his signature by one of the parties, not being partners, will only be evidence against himself. *Gray v. Palmers*, 1 Esp. 135.

An agent who makes a note in his own name will be personally liable, unless he distinctly show on the face of it that he signs as agent only. See sect. 26, *ante*, p. 326. Thus, "On demand, we jointly and severally promise to pay E. H. or order 250*l.*, value received, for and on behalf of the W. N. Association ; P. S., J. W., Directors," was held to mean jointly and personally ; and, therefore to make the persons signing individually liable. *Healey v. Story*, 3 Exch. 3 ; *Penkivill v. Connell*, 5 Exch. 381 ; *Bottomley v. Fisher*, 1 H. & C. 211 ; 31 L. J., Ex. 417. The same rule applies, where the note is a joint one only. *Price v. Taylor*, 5 H. & N. 540 ; 29 L. J., Ex. 331 ; *Gray v. Raper*, L. R., 1 C. P. 694 ; and *Courtauld v. Sanders*, 16 L. T., N. S. 562, T. T. 1867, C. P. So, where a note is signed by the directors of a company, and the seal of the company is affixed, they are personally liable, unless it appear on the note that they signed for the company only. *Dutton v. Marsh*, L. R., 6 Q. B. 361. But, where the defendants, being directors of the com-

pany, signed the following note: "Three months after date we jointly promise to pay F. S. or order, 600*l.*, for value received in stock, on account of the L. & B. Company, Limited, J. M., H. W. W., J. H., Directors," it was held that it sufficiently appeared that the note was made in the name of the company, within 19 & 20 Vict. c. 47, s. 43; and that the defendants were not personally liable. *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J., Ex. 326, Ex. Ch.; *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J., Ex. 348. So, a promissory note in the form "On demand, I promise to pay A. & Co., or order, the sum of 1500*l.*, with legal interest thereon until paid, value received. For Mistley, Thorpe, and Walton Ry. Co., J. S. Secretary," was held not to bind the secretary personally, although the directors were not empowered by their act of incorporation to bind the company by notes. *Alexander v. Sizer*, L. R., 4 Ex. 102. The Companies Act, 1862, s. 47, is similar, though wider in its terms; it is not affected by the B. of Ex. Act, 1882, *vide* sect. 97 (2 b), *ante*, p. 319. In *Aggs v. Nicholson*, *supra*, the court also rested their decision on the fact, which they held was in effect pleaded, that the defendants did not deliver the note, nor the plaintiffs take it, except as a note on behalf of the company; this is pointed out by Bramwell, B., in *Price v. Taylor*, *ante*, p. 376; and this would, at any rate, be an equitable defence; *per* Wilde, B., S. C. See *Courtauld v. Sanders*, 16 L. T., N. S. 468; where such a plea was pleaded, and *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273; S. C. in error, 1 H. & C. 202; 31 L. J., Ex. 451. See further cases cited, *ante*, pp. 333, 334.

When a note payable to the maker's own order is indorsed, it becomes a note payable to bearer, or to the indorsee, or his order, according as the indorsement is in blank or to a named person. *Hooper v. Williams*, 2 Exch. 13; *Absolon v. Marks*, 11 Q. B. 19; *Brown v. De Winton*, and *Gay v. Lander*, 6 C. B. 336. And, it makes no difference that there is a foot-note to it making it payable at a particular place. *Masters v. Baretto*, 8 C. B. 433. By sect. 7 (2), *ante*, p. 320, a note may now be made payable to the holder of an office for the time being; this provision is new, see *Cowie v. Stirling*, 6 E. & B. 333; 25 L. J., Q. B. 335, Ex. Ch. "I promise to pay A. B. or order, three months after date, 100*l.*, as per memorandum of agreement," is on the face of it, a negotiable promissory note; and if the effect of the agreement is to make it conditional, the defendant must show it by his statement of defence. *Jury v. Barker*, E. B. & E. 459; 27 L. J., Q. B. 255.

Presentment for payment.] By sect. 87. (1.) "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable." When a place for payment is specified in the body of the note, presentment there must be proved, though the maker may not be there to pay, and may have absconded, and left no effects there or other means of payment. *Sands v. Clarke*, 8 C. B. 751. The words "payable at," &c., at the foot of a note is, from mercantile usage, a memorandum only; *Masters v. Baretto*, *supra*; and *per curiam* in *Warrington v. Early*, 2 E. & B. 766; 23 L. J., Q. B. 48. See the cases on presentment to acceptor, *ante*, pp. 344, *et seq.* In an action on a note payable on demand, a demand need not be alleged or proved; for the action itself is a demand. *Rumball v. Ball*, 10 Mod. 38. It is otherwise if payable after sight. *Holmes v. Kerrison*, 2 Taunt. 323. By sect. 10 (1) (a), *ante*, p. 320, replacing (34 & 35 Vict. c. 74), s. 2, promissory notes payable at sight, or on presentation, are payable on demand. If a note be made payable at a particular town, and the maker has no residence there, a presentment at the banking-house there will support an allegation that it was presented there to the maker. *Hardy v. Woodroffe*, 2 Stark. 319. If a note be payable at two places, presentment at either is sufficient.

Beeching v. Gower, Holt, N. P. 313. Notice of dishonour to the maker is unnecessary, for he is in the position of the acceptor of a bill. Sect. 89 (2), *ante*, p. 375.

Evidence under money claims.] A promissory note is evidence on the money claims only between immediate parties. *Waynam v. Bend*, 1 Camp. 175. It is evidence of money lent by the payee to the maker. Bayley on Bills, 6th ed., 362. A promissory note dated August, 1844, purporting to be for the amount of interest due on another note for 117*l.* down to 6th July, 1844, is evidence of an account stated in August, 1844, of a then subsisting debt of 117*l.* *Perry v. Slade*, 8 Q. B. 115. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note. *Farr v. Price*, 1 East, 58, and *Id.*, n. And, the note may be used as evidence on the terms of a loan of money, though avoided by an alteration without a fresh stamp. *Sutton v. Toomer*, 7 B. & C. 416.

The plaintiff cannot resort to the money counts, if the note has been lost, *ante*, p. 324. Nor, can he resort to them where he has made a note his own by laches, for this operates as payment. *Camidge v. Allenby*, 6 B. & C. 373. See *Smith v. Mercer*, L. R., 3 Ex. 51; *Hopkins v. Ware*, L. R., 4 Ex. 268. A special defence may be necessary in both cases.

Indorsee against Maker.

In an action on a promissory note by an indorsee against the maker, the plaintiff will have to prove, in addition to the making of the note by the defendant, the indorsement stated in the statement of claim, if traversed.

It has been already stated, *ante*, p. 337, *et seq.*, in what manner an indorsement may be proved, and what indorsements are to be proved. Where indorsements are unnecessarily mentioned, as in claiming upon a note made to payee or bearer, they must, if traversed, be proved. *Waynam v. Bend*, 1 Camp. 175. But *semb.*, the finding on such issues will be immaterial, if the plaintiff appears to be bearer; and the indorsements may be struck out at the trial. See *Macgregor v. Rhodes*, *infra*.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a promissory note, the traversable allegations are, the defendant's indorsement; the presentment to the maker; his default; and notice to the defendant of the dishonour.

By sect. 87. "(2.) Presentment for payment is necessary in order to render the indorser of a note liable."

"(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice."

It seems that sect. 56 does not apply to notes, *vide ante*, p. 231.

In what manner an indorsement may be proved has been already stated, *ante*, pp. 337, *et seq.* An indorsement admits all prior indorsements, and also the handwriting of the maker. *Lambert v. Oakes*, 1 Ld. Raym. 443; *Free v. Hawkins*, Holt, N. P. 550; *Macgregor v. Rhodes*, 6 E. & B. 266; 25 L. J. Q. B. 318.

In what manner a note or bill of exchange must be presented for payment has been stated, *ante*, p. 344. A promissory note must be presented

within a time which is reasonable, under all the circumstances. *Chartered Mercantile Bank of India, &c. v. Dickson*, L. R. 3 P. C. 574.

It has been before stated by and to whom, and within what time, notice of dishonour must be given, and what will be considered sufficient proof of the delivery of the notice and of its contents, &c., *ante*, pp. 346, *et seq.* It has also been shown in what cases proof of notice may be dispensed with by an acknowledgment or otherwise, *ante*, pp. 353, *et seq.* Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him as indorser, and oral evidence is not admissible that it was agreed between the parties that the note should not be put in force until after a given event. *Free v. Hawkins*, 8 Taunt. 92.

Evidence under money claims.] An indorsement is evidence of money lent by the indorsee to the indorser. *Keesebower v. Tims*, Bayley on Bills, 6th ed., 363.

Damages generally.

Vide sect. 57, *ante*, p. 359.

Defences, generally, to Actions on Promissory Notes.

Vide ante, p. 360.

ACTION ON POLICY OF INSURANCE.

Marine Insurance.

The plaintiff may be called upon to prove the following facts:—viz., the subscription or execution of the policy by the defendant; the interest of the party as averred; the putting of the goods, &c., on board, when the policy is on goods; the inception of the risk; compliance with warranties; a licence for the purpose of legalising the voyage, in some cases; the loss; and amount of it.

Form of policy.] The form of the policy is, in a great measure, regulated by the Stamp Act, 30 & 31 Vict. c. 23, the provisions of which act will be found, *ante*, p. 248. As to the effect of an insurance slip, *vide ante*, p. 249.

The policy is sometimes so framed that no action is maintainable on the policy till the loss has been adjusted. *Tredwen v. Holman*, 1 H. & C. 72; 31 L. J., Ex. 398. But on this case see *Edwards v. Aberayron Mutual Ship Insur. Soc.*, 1 Q. B. D. 563, 596, *per* Brett, J.

It is immaterial in what part of the policy the subject-matter of insurance appears. *Griffiths v. Bramley-Moore*, 4 Q. B. D. 70, C. A.

Assignment of policy.] By the Policies of Marine Insurance Act, 1868 (31 & 32 Vict. c. 86), s. 1, it is enacted that, "whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected." Sect. 2, the

assignment may be made by indorsement, in the form given in the schedule to the act. And see now J. Act, 1873, s. 25 (6), *ante*, pp. 281, 282.

The act applies to the case of an assignment of the policy, after loss; *Lloyd v. Fleming*, L. R., 7 Q. B. 299; but, not where the policy has lapsed; *N. of England, &c. Co. v. Archangel Maritime Insur. Co.*, L. R. 10 Q. B. 249. It will not extend to an agreement only for an assignment. See *Spencer v. Clarke*, 9 Ch. D. 137. As to raising a defence under the latter part of this section, *vide post*, p. 404.

Proof of the Policy.] On a defence denying the making of the policy, the policy must be produced and proved; and if subscribed by an agent of the defendant, the handwriting and authority of the agent must be proved. If the authority of the agent was in writing it should generally be produced; but, the authority may also be proved by showing that the defendant has recognised the act of the agent in this instance, or in other similar instances in which he has subscribed policies for the defendant; as where a witness stated that he was authorised by power of attorney, but added, that the defendant had been in the habit of paying losses upon policies which the witness had subscribed in his name, the power need not be produced. *Haughton v. Ewbank*, 4 Camp. 88; *Brocklebank v. Sugrue*, 5 C. & P. 21. Where a witness proved the agent's handwriting, and swore that he had often observed him sign policies for the defendant, but did not know that the defendant had given any authority to sign that policy, Ld. Kenyon held the agency proved; *Neal v. Erving*, 1 Esp. 61; but, where the witness added that he did not know of any instance in which the defendant had paid a loss upon any policy so subscribed, Ld. Ellenborough held the proof of agency was incomplete; *Courteen v. Touse*, 1 Camp. 43, n. The authority given to an insurance broker to effect a policy does not extend to warrant him in cancelling it. *Xenos v. Wickham*, L. R., 2 H. L. 296.

A custom that an agent's authority to underwrite policies is limited to a particular sum is good, although the assured is not aware of the limitation, and if the agent exceed the sum, the principal is not bound by the policy at all. *Baines v. Ewing*, L. R., 1 Ex. 320.

As to insurance on an open policy, on goods in ships, to be afterwards declared, see *Ionides v. Pacific, &c. Insurance Co.*, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517, Ex. Ch.; *Stephens v. Australasian Insur. Co.*, L. R., 8 C. P. 18; *Imperial Marine Insur. Co. v. Fire Insur. Cor.*, 4 C. P. D. 166.

In the case of incorporated joint-stock Companies for insurance the policies often provide expressly on the face of them that the capital stock and funds of the company shall alone be charged, and that no proprietor shall be liable beyond his share in it. In such cases the insured cannot sue the proprietors as general partners jointly liable *in solido*, even if the stock and funds be adequate; and it is questionable whether such a policy amounts to a joint contract at all, or to a contract with each proprietor in proportion to his share, or to a separate contract with the directors who signed the policy in pursuance of the deed of settlement. See *Halket v. Merchant Traders' Insurance Co.*, 13 Q. B. 960; *Hallett v. Dowdall*, 18 Q. B. 2; 21 L. J., Q. B. 98, Ex. Ch.

The usage of a particular trade will be regarded in the construction of policies, and every underwriter is supposed to be acquainted with it. *Noble v. Kenmure*, 2 Doug. 510, and cases cited, *ante*, pp. 21, *et seq.* As to the stamp and alteration of the policy, see *ante*, pp. 247-250.

An action will lie at the suit of the agent or other person in whose name the insurance was effected; *Provincial Insur. Co. of Canada v. Leduc*, L. R., 6 P. C. 224; and, a principal may ratify an insurance made for his benefit after knowledge of loss; *Williams v. N. China Insur. Co.*, 1 C. P. D. 757;

or in the name of the person interested. Policies are frequently under seal, but the matters to be proved are substantially the same whatever be the form of the statement of claim.

Interest in the ship, how proved.] Insurances without interest, or wagering policies, on British ships, or goods therein, are void by 19 Geo. 2, c. 37, s. 1, and, the interest must be proved otherwise than by the policy itself. Interest is not in issue unless traversed. In the case of foreign ships, interest need not be alleged or proved. *Thellusson v. Fletcher*, 1 Doug. 315; *Craufurd v. Hunter*, 8 T. R. 13; *Nantes v. Thompson*, 2 East, 385.

The interest in the ship, as stated in the claim, may be proved, *primâ facie*, by evidence of possession of the ship; or, of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, &c. *Amery v. Rogers*, 1 Esp. 209; *Thomas v. Foyle*, 5 Esp. 88. A common mode of proof is to call the master, who will prove that he was appointed and employed by the parties in whom the interest is averred; and, though it should appear, on cross-examination, that the plaintiff claims under a bill of sale, it is not, on that account, necessary for him to produce the bill, or the ship's register, unless such further evidence should be rendered necessary in support of the *primâ facie* proof of ownership, in consequence of proof to the contrary. *Robertson v. French*, 4 East, 136. *Pirie v. Anderson*, 4 Taunt. 652. Where the interest is averred in persons who have never been in possession of the ship, it may be proved by showing the ownership of the persons under whom such parties claim, and the derivative title from them—viz., the bill of sale; but now, by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 107, and 18 & 19 Vict., c. 91, s. 15, the register, or an examined or certified copy thereof, may now be used as *primâ facie* proof of ownership. See *Effect of ship's register*, ante, p. 206.

Interest in ship—Insurable Interest.] A person who lends money for repairs of a ship has no insurable interest in it, and, as a master has no power to hypothecate, an hypothecation of the ship by the master gives no insurable interest to such a creditor. *Stainbank v. Fenning*, 11 C. B. 51; 20 L. J., C. P. 226; *Stainbank v. Shepard*, 13 C. B. 418; 22 L. J., Ex. 341, Ex. Ch. And, *quære*, whether a valid hypothecation would give such interest. S. C. C.

If the assured assign away his interest in the ship before the loss he cannot recover, except as trustee for the assignee, where there has been an agreement that it shall be kept alive for the benefit of the latter. *Powles v. Innes*, 11 M. & W. 10; *N. of England Oil Cake Co. v. Archangel Ins. Co.*, L. R., 10 Q. B. 249. But, an assignment by way of mortgage, though in terms absolute, will not prevent the assured from recovering. *Ward v. Beck*, 13 C. B., N. S. 668; 32 L. J., C. P. 113.

Interest in goods, how proved—Bill of lading.] The interest in goods may be proved *primâ facie*, like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading. A bill of lading directing the delivery of the goods to the consignee is evidence of interest in him, the captain proving that he received the goods under it; *M'Andrew v. Bell*, 1 Esp. 373; and where the goods are made deliverable to the consignor, the bill indorsed by him, either specially or in blank, is evidence of interest in the indorsee, or holder; *Lickbarrow v. Mason*, 2 T. R. 71; but, such evidence is *primâ facie* only, and not conclusive; *Seagrave v. Union Marine Insurance Co.*, L. R., 1 C. P. 305. The signature of deceased master to the bill of lading, as it has the effect of charging himself, is evidence of the interest of the consignee; but, if the

master qualifies his acknowledgment by the words "contents unknown," it is then no evidence *per se*. *Haddow v. Parry*, 3 Taunt. 303. Where, to prove property in a cargo by purchase beyond seas, the plaintiff produced a bill of parcels of one G., at Petersburg, with his receipt to it, and proved his hand, Lee, C. J., admitted it as evidence against the insurers. *Russel v. Boheme*, 2 Str. 1127.

Interest in goods—Insurable interest.] An averment that the plaintiffs were interested in the profits to arise from the sale of goods which H. & Co. had sold to them, is not satisfied by showing an oral agreement for the sale to the plaintiffs not capable of being enforced against H. & Co. *Stockdale v. Dunlop*, 6 M. & W. 224. A mere equitable interest in goods is an insurable one; thus, where A., being indebted to B., indorses a bill of lading to C., with a letter telling him to hold the goods in trust for B., B. has an insurable interest; *Hill v. Secretan*, 1 B. & P. 315; but a mere agent, who has not possession, nor any lien on the goods, has no insurable interest in them; *Seagrave v. Union Marine Insur. Co.*, *ante*, p. 381. A lien on goods is insurable; as, where the plaintiff, owner of a ship, which had been abandoned, but afterwards brought into harbour, together with goods, by salvors, was obliged to pay the whole salvage, and thereby acquired a lien on the cargo for contribution in the nature of general average; *Briggs v. Merchant Traders' Insur. Ass.*, 13 Q. B. 167; such interest is sufficiently described as average expenses; S. C. A person who insures goods lost or not lost may recover, though he acquired his interest after a partial loss of them, if he bought without knowledge of the loss. *Sutherland v. Pratt*, 11 M. & W. 296. But, after knowledge of loss, no assent or election by the purchaser to the appropriation of goods under a contract of sale will enable him to throw a liability on the assured which did not exist at the time of loss. *Anderson v. Morice*, L. R., 10 C. P. 609, Ex. Ch.; 1 Ap. Ca. 713; *Stock v. Inglis*, 9 Q. B. D. 708. As to what constitutes an insurable interest in goods contracted to be sold to the assured, see S. CC. A policy "on goods" does cover loss of profits to result from the sale thereof, S. CC. It is sufficient if the policy specify the subject-matter of insurance, and it is not necessary to describe the assured's interest in it, unless his interest is such as to affect the risk insured against. *Dixon v. Whitworth*, 4 C. P. D. 371, 375, (reversed in C.A. on another point, W. N. 1880, p. 43, H.S.), following *Mackenzie v. Whitworth*, L. R., 10 Ex. 142; 1 Ex. D. 36, Ex. Ch. Thus, an underwriter "on goods" may re-insure by the same description; and the policy need not be expressed to be a re-insurance, S. C. The assignee, after loss of the policy of insurance, may now recover in his own name, *vide ante*, pp. 379, 380.

If it be averred that the plaintiff was interested at the time of effecting the policy, it is immaterial; it is sufficient to show that he was interested at the commencement of the risk. *Rhind v. Wilkinson*, 2 Taunt. 237. Where a policy was effected for all persons interested, and B. was in fact interested at the time, but had not authorised the insurance, it is sufficient to prove an adoption of the policy by B. after the loss. *Hagedorn v. Oliver-son*, 2 M. & S. 485; *Cory v. Patton*, L. R., 9 Q. B. 577.

As to the right of a particular owner to insure goods for their full value, for the benefit of himself and the general owner, see *Ebsworth v. Alliance Marine Insur. Co.*, L. R., 8 C. P. 596, where the proper averment of interest is also discussed. The judgment in this case was reversed in the Ex. Ch. upon terms, the damages being reduced so as to represent the loss sustained by the plaintiff alone. See 43 L. J., C. P. 394, n.

By the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 55, insurances against (1) loss of life or personal injury caused to

any person carried in any ship ; (2) damage or loss caused to any goods, merchandise, or other things whatsoever on board any ship ; (3) loss of life or personal injury, by reason of the improper navigation of any ship, caused to any person carried in any other ship or boat ; (4) loss or damage, by reason of the improper navigation of any ship, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, and occurring without the actual fault or privity of the owners, shall not be invalid by reason of the nature of the risk.

Insurance of freight.] The interest of a shipowner in the profit expected from carrying his own goods is properly described and insured as *freight*. *Flint v. Fleming*, 1 B. & Ad. 45 ; *Detcauz v. J'Anson*, 5 N. C. 519. As to the nature of this insurance, see *Potter v. Rankin*, L. R., 6 H. L. 83 ; in this case the insurance was of specific chartered freight, to be earned on a future voyage, against perils to be incurred in the current one. As to the term freight, including passage money, see *Denoon v. Home and Colonial Insur. Co.*, L. R., 7 C. P. 341. In a valued policy the court will inquire of what freight insured consisted to ascertain whether the claim has been satisfied or not. *Williams v. N. China Insur. Co.*, 1 C. P. D. 757, C. A.

Inception and end of the risk.] The risk begins at the port, when the insurance is on a voyage "at and from," &c. ; *Palmer v. Marshall*, 8 Bing. 79, 317 ; as soon as the ship is geographically within the port ; *Haughton v. Empire Marine Insur. Co.*, L. R., 1 Ex. 206 ; or, at the beginning of the voyage, when the insurance is "from" the port ; *Small v. Gibson*, 16 Q. B. 156, 157 ; 20 L. J., Q. B. 152, Ex. Ch. The words "port or ports of loading" in the province of B. A. include, not merely those places technically called ports, but all places to which ships are accustomed to resort for the purpose of taking in cargo. *Harrower v. Hutchinson*, L. R., 4 Q. B. 523. It makes no difference that by the regulations of the province a vessel which has loaded at such port cannot proceed direct homewards. *Id.* The judgment was reversed on other grounds, but these points were affirmed by majority of the Ex. Ch., L. R., 5 Q. B. 584, 589.

By a charter-party, a vessel, after discharging her outward cargo for owner's benefit, was to proceed to G. or I., as ordered at C. or S. by the charterer's agents, and there load a cargo, and therewith proceed homewards, and discharge at a port in the United Kingdom, and so end the voyage ; it was held that the voyage commenced from the period of the discharge of the outward cargo. *Bruce v. Nicolopulo*, 11 Exch. 129 ; 24 L. J., Ex. 321. See *Valente v. Gibbs*, 6 C. B., N. S. 270 ; 28 L. J., C. P. 229. A charter-party, with the usual clause against sea perils during the voyage, stipulated that a certain steamer at N., being tight, &c., and fitted for the voyage, should proceed to the usual place of loading at N., (or as near thereto as could safely be got), and there load and proceed to A. : it was held, that the voyage commenced from her starting from her then berth for the loading place, and that the exception applied to that portion of the voyage. *Barker v. M'Andrew*, 18 C. B., N. S. 759 ; 34 L. J., C. P. 191.

In the case of a *time* policy (i.e., an insurance within certain dates without regard to a particular voyage), the risk begins at the first date.

Where the vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage, or risk, must be given. *Koster v. Innes*, Ry. & M. 333. This may be proved by some of the crew ; or proof of a particular destination by charter-party will afford a presumption that she sailed on the chartered voyage ; so, proof of her clearing out for a particular port would be evidence that she set sail for that port ; *per* Ld. Ellenborough, C. J. *Cohen v. Hinckley*, 2 Camp. 52. So, proof, of a convoy-bond

for a particular port, signed by the captain, coupled with the testimony of the custom-house officer that a certificate and other papers for such a voyage would, in the regular course of office, be delivered to the captain before he sailed, together with proof of his sailing, is *prima facie* evidence of the ship having sailed on such voyage. *Ibid.* A licence for the port mentioned in the policy is *prima facie* evidence to the same effect. *Marshall v. Parker*, 2 Camp. 69. If the statement of claim aver that the ship sailed after the making of the policy, but in fact it was before, the variance is not material. *Peppin v. Solomons*, 5 T. R. 496.

The risk in the case of a voyage policy on the ship to a port without any provision as to her safety there, terminates when she is anchored at the port in the usual place for discharge of her cargo. *Stone v. Marine Insur. Co. &c.*, 1 Ex. D. 81. But, the policy usually extends in terms to the end of a period of 24 hours after mooring in safety in port, and the underwriters are not liable for a seizure after the 24 hours, though for smuggling committed on the voyage; *Lockyer v. Offley*, 1 T. R. 252; but, where during the 24 hours the ship is compelled to go back for performance of quarantine, the risk continues; *Waples v. Eames*, 2 Str. 1243. A ship was insured from L. to certain ports and during 30 days' stay in her last port of discharge, and in another part of the policy the risk was stated to continue until she had moored at anchor 24 hours in good safety; held that the 30 days did not begin to run till the expiration of the 24 hours. *Mercantile Marine Insur. Co. v. Titherington*, 5 B. & S. 765; 34 L. J., Q. B. 11; *Gambles v. Ocean Marine Ins. Co.*, 1 Ex. D. 141, C. A. Where the risk was "at and from A. to B., and for 30 days after arrival," "upon the ship, &c., until she hath moored at anchor 24 hours in good safety," it was held, that after the expiration of 30 days from the arrival and mooring of the vessel, and her having remained as a vessel, though not sound, for 24 hours, the underwriters were not responsible for a subsequent total loss. *Lidgett v. Secretan*, L. R., 5 C. P. 190.

As to re-insurance by one insurance company under a running policy with another company, see *Gledstones v. R. Exch. Insur. Co.*, 5 B. & S. 797; 34 L. J., Q. B. 30: such policy is good, although the subject-matter of the insurance was declared after notice to all parties of the loss of the vessel, although it was not then known that the insurers had any insurable interest therein. S. C.

In the case of goods, the risk depends on the agreement of the parties, but, it usually begins with the loading on board, and ends with the safe discharge, including their passage to the shore by usual means. *Tierney v. Etherington*, cited *per cur.*, 1 Burr. 348; 3 Kent, Com. 309; see *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 688. Where the insurance was on goods "at and from a given port, beginning the adventure from the loading at as above," a constructive loading at the port is sufficient; as, if the goods have been partially reloaded, or there has been a material alteration in the ownership of the goods or the voyage, on the arrival of the ship at the port with the goods already aboard. *Carr v. Montefiore*, 5 B. & S. 408, 425; 33 L. J., Q. B. 57, 256. See also *Joyce v. Realm Marine Insur. Co.*, L. R., 7 Q. B. 586. It seems that evidence of brokers and merchants is admissible to prove what is the custom as to when the outward bound risk determined in order to show when the homeward bound risk commenced. *Camden v. Cowley*, 1 W. Bl. 417. The risk may include land transit. *Rodocanachi v. Elliott*, L. R., 8 C. P. 649; L. R., 9 C. P. 518, Ex. Ch.

The risk on insurance of freight, in the absence of express provisions, begins when the goods, or part, are on board, or the ship is at the port of loading in a condition to take them on board. *Tonge v. Watts*, 2 Str. 1251; *Devauz v. J'Anson*, 5 N. C. 519; *Williamson v. Innes*, 1 M. & Rob. 88; 8

Bing. 81, n.; *Barber v. Fleming*, L. R., 5 Q. B. 59; *Foley v. United Fire, &c. Insur. Co.*, L. R., 5 C. P. 155, Ex. Ch.; and *Jones v. Neptune Marine Insur. Co.*, L. R., 7 Q. B. 702. 3 Kent, Com. 270, 311.

Shipment of the goods.] The shipment of goods on board is usually proved by the captain; and, if he be dead, the production of the bill of lading, and proof of his handwriting will be evidence of the shipping as well as of the interest, but not if he add "contents unknown;" *Haddow v. Parry*, 3 Taunt. 303; nor, if he be alive; *Dickson v. Lodge*, 1 Stark. 226. The copy of an official report, made in pursuance of the Customs' Acts, 12 Car. 2, by the searcher of the customs, containing an account of the cargo exported, has been admitted to prove the shipping, without calling the searcher. *Johnson v. Ward*, 6 Esp. 48.

In an action upon a policy on freight, the assured must show that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so. *Flint v. Fleming*, 1 B. & Ad. 45; *Devaux v. J'Anson*, *ante*, p. 384.

Compliance with warranties.] Warranties are expressed or implied. They are in the nature of conditions precedent. Where the policy contains an express warranty, and the defence raises the point of non-compliance therewith, a literal and strict compliance with it must be proved; it is not sufficient to show something tantamount to a performance, unless it be a waiver or dispensation of performance, which must be pleaded as such, and not as a compliance. *Pawson v. Watson*, Cowp. 785; 2 Wms. Saund. 201, 201 a, (1); *Crocker v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153. But, an amendment to admit evidence of such a defence would be allowed in a proper case, *vide ante*, p. 269, *et seq.*

A memorandum written on a separate piece of paper cannot be considered a warranty. *Pawson v. Barnevelt*, 1 Doug. 12, n. But, if a separate paper be referred to in the policy, it may thereby become part of the policy, and constitute a warranty. *Worsley v. Wood*, 6 T. R. 710 (fire policy); *Colledge v. Harty*, 6 Exch. 206; 20 L. J., Ex. 146; *Heath v. Durant*, 12 M. & W. 438. It is immaterial whether the warranty is in the margin or in the body of the policy. *Bean v. Stupart*, 1 Doug. 11; *De Hahn v. Hartley*, 1 T. R. 343. A warranty may be waived by a memorandum on the policy without a stamp, under the 30 & 31 Vict. c. 23, s. 10 (*ante*, p. 249), *Hubbard v. Jackson*, 4 Taunt. 169; *Weir v. Aberdeen*, 2 B. & A. 325; decided under 35 Geo. 3, c. 63, s. 13.

Warranty of sailing.] To satisfy a warranty "to depart" on or before a particular day, the vessel must be out of port on or before that day; *Moir v. R. Exch. Assur. Co.*, 3 M. & S. 461; 6 Taunt. 241; but, a warranty "to sail" is satisfied by the ship breaking ground and getting under weigh; S. C.; *Lang v. Anderdon*, 3 B. & C. 495. Where the insurance was from an inland port, as Lyons, and the ship left that port before the day, without her masts and heavy tackle, which she afterwards took in at Marseilles (this being the usual course) without unreasonable delay, but did not sail thence till after the day; it was held that, looking at the nature of the voyage, and the mercantile usage in similar adventures, she had complied with the warranty to sail by the given day, and with the implied warranty of seaworthiness. *Bouillon v. Lupton*, 15 C. B., N. S. 113; 33 L. J., C. P. 37; and see *Dixon v. Sadler*, *post*, p. 387. But, unless the ship is unmoored, the warranty to sail is not complied with. *Nelson v. Salvador*, M. & M. 309. Sailing before the vessel has got her clearances, and is equipped for the voyage, is not a sailing within the warranty. *Ridsdale v. Newnham*, 3 M.

& S. 456. So, if the ship leave the harbour on the day without a sufficient crew on board, though the remainder of the crew are engaged and ready to sail. *Graham v. Barras*, 5 B. & Ad. 1011. Where a vessel sailed from St. Anne's, Jamaica, within the time of warranty with her cargo and clearances on board, and called at another usual port in Jamaica for convoy, where she was detained by an embargo till after the time of warranty, it was held that this was a sufficient sailing from Jamaica. *Bond v. Nutt*, Cowp. 601; *Thellusson v. Fergusson*, 1 Doug. 360. A warranty to sail from Q. on or before November 1st, contained in a policy on a vessel "at and from" New York to Q. and thence to England, is confined to the part of the voyage from Q. to England, and the insurer is therefore liable for a loss occurring after November 1st on the voyage from New York to Q. *Baines v. Holland*, 10 Exch. 802; 24 L. J., Ex. 204. In a time-policy a warranty not to sail for a particular country after a certain day, is complied with by getting out of the dock, and endeavouring to leave the harbour in the prosecution of the voyage; it might be otherwise, if the warranty were to sail from some particular terminus. *Cochrane v. Fisher*, 1 C. M. & R. 809, Ex. Ch. A ship having been proved to have sailed under convoy, to prove the time of sailing the log-book of the commander of the convoy is evidence. *D'Israeli v. Jowett*, 1 Esp. 427.

Warranty of flag.] On a policy on goods, in order to prove a warranty that the ship insured was Danish, proof of her carrying the flag of that nation at times when she was free from the danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, was held *prima facie* evidence. *Arcangelo v. Thompson*, 2 Camp. 620. Under a warranty of neutrality it is sufficient to show that the ship was neutral when the risk commenced, though from subsequent hostilities it ceased to be so during the voyage. *Eden v. Parkison*, 2 Doug. 732. In a policy of insurance on goods to be carried in a certain ship, there is no implied warranty that the ship shall not change her nationality. *Dent v. Smith*, L. R., 4 Q. B. 414.

Implied warranties.] There are also certain implied warranties, the breach of which will prevent the insured from recovering. Such implied warranties are;—that there shall be no deviation from the voyage insured;—that it shall be commenced without unreasonable delay;—that all material circumstances should be disclosed to the underwriters;—and that the ship shall be seaworthy: and a breach of these conditions avoids the policy whether there be fraud or not. *Small v. Gibson*, 16 Q. B. 158; 20 L. J., Q. B. 158, Ex. Ch., *per cur.*

Warranty of seaworthiness.] By being seaworthy "is meant that the ship shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it were a voyage down a canal or river and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But, the assured makes no warranty to the underwriters, that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage, and their negligence or misconduct is no defence to an action on the policy where the loss had been immediately occasioned by the perils insured against;" *per Parke, B.*,

in delivering the judgment of the court, in *Dixon v. Sadler*, 5 M. & W. 414; cited and approved by the court in *Biccard v. Shepherd*, 14 Moo. P. C. 494; *Bouillon v. Lupton*, 15 C. B., N. S. 113; 33 L. J., C. P. 37, cited *ante*, p. 385; *Davidson v. Burnand*, L. R., 4 C. P. 117; and *Quebec Marine Insur. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234. An exception of loss from unseaworthiness does not restrict the implied warranty. S. C. Where the ship is not seaworthy when she sails on her voyage, this is not remedied by her becoming so afterwards and before loss. S. C., following *Forshaw v. Chabert*, 3 B. & B. 158; and overruling *Weir v. Aberdeen*, 2 B. & A. 320, 324, on this point.

There is a warranty of a similar nature, in an insurance upon goods, with respect to the ship on which they are loaded. *Biccard v. Shepherd*, *supra*. In a policy on deck cargo, it is insufficient that the ship is fit safely to encounter weather, only because the deck cargo can be readily jettisoned. *Daniels v. Harris*, L. R., 10 C. P. 1. But, there is no implied warranty as to the goods themselves, that they are seaworthy for the voyage. *Koebel v. Saunders*, 17 C. B., N. S. 71; 33 L. J., C. P. 310. In *Biccard v. Shepherd*, *supra*, there was an insurance on copper ore, "at and from the anchorages of H. and N. to S., to commence from the loading at and from the above ports;" the ship was seaworthy at H., but became unseaworthy at N. by reason of overloading, and was lost after sailing from N.; and it was held that the insured could recover for the ore shipped at H., but not for that shipped at N. See also *Bouillon v. Lupton*, *supra*. On an insurance of goods until safely landed, including all risk to and from the ship, there is no warranty that the lighters employed to land the cargo shall be seaworthy. *Lane v. Nixon*, L. R., 1 C. P. 412.

Prima facie a ship is presumed to be seaworthy; *Parker v. Potts*, 3 Dow, 23; and the onus of proving she is not seaworthy lies on the defendants; *Davidson v. Burnand*, *supra*; but, where the inability of the ship to perform the voyage becomes evident in a short time after sailing, the presumption is that it arises from causes existing before her setting sail on the voyage, and that the ship was not then seaworthy; and the *onus probandi* in such cases rests with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage; *per* Ld. Eldon, in *Watson v. Clark*, 1 Dow, 344; explained by the C. A. in *Pickup v. Thames & Mersey Marine Insur. Co.*, 3 Q. B. D. 594, C. A.; *Douglas v. Scougall*, 4 Dow, 269. A ship is not fit for a voyage unless she sails with a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. Therefore, where, on a voyage from Mauritius to London, there was no one on board competent to supply the captain's place in case of illness, Ld. Tenterden, C. J., left it to the jury whether the vessel was seaworthy, and the jury found in the negative. *Clifford v. Hunter*, M. & M. 103. Kent (3 Com. 287, n.) observes that this ruling will hardly apply to short coasting voyages, and cites an American case to that effect. But, where the assured has once provided a sufficient crew, the negligence of the crew at the time of the loss is no breach of the implied warranty. *Busk v. R. Exch. Assur. Co.*, 2 B. & A. 73; *Dixon v. Sadler*, *supra*.

There is an implied warranty of seaworthiness in a voyage policy, though the insurance be on an abandoned ship and cargo in the interest of the salvor's lien. *Knill v. Hooper*, 2 H. & N. 277; 26 L. J. Ex. 377. But, "seaworthiness" is a relative term; and, it is for the jury to say whether the ship was reasonably able to perform the voyage; S. C.; as it depends on the nature of the ship as well as of the voyage insured for; and in an action on a policy (in the usual form) evidence of these facts is admissible to show the amount of seaworthiness implied. Therefore, on a policy "on the Ganges steamer from the Clyde to Calcutta," a vessel constructed for

river navigation (as was disclosed when the policy was effected), and which, although unfit for ocean navigation, had been made as seaworthy as her size and construction would admit; it was held the underwriters were liable. *Burges v. Wickham*, 3 B. & S. 689; 33 L. J., Q. B. 17; *accord. Clapham v. Langton*, 5 B. & S. 729; 34 L. J., Q. B. 46, Ex. Ch. See also *Bouillon v. Lupton*, *ante*, p. 385. As to evidence of unseaworthiness, see *Merchants' Trading Co. v. Universal Marine Co.*, cited L. R., 9 Q. B. 596; and *Anderson v. Morice*, L. R., 10 C. P. 58, 609, Ex. Ch.; *affirm.* on this point, 1 Ap. Ca. 713, D. P. It is not a statutory unseaworthiness if a ship sail in contravention of 16 & 17 Vict. c. 107, ss. 170-2, with a deck cargo and without a certificate of clearance. *Wilson v. Rankin*, L. R., 1 Q. B. 162, Ex. Ch.

There is no implied warranty of seaworthiness where the policy is merely a time policy. *Gibson v. Small*, 4 H. L. C. 353; *Jenkins v. Heycock*, 8 Moo. P. C. 351; *Fawcus v. Sarsfield*, 6 E. & B. 192; 25 L. J., Q. B. 249; *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, D. P.; and *Thompson v. Hopper*, 6 E. & B. 172; 25 L. J., Q. B. 240. But, if the injury or loss happen to the ship at sea, when exposed to the ordinary operation of wind and waves, in consequence of its being, to the knowledge of the assured, in a defective state, or improperly equipped, the insurer will not be liable for injury thus occasioned by the misconduct of the assured; *S. C.*, *Id.*; provided such state was the immediate cause of the loss; *S. C.*, E. B. & E. 1038; 27 L. J., Q. B. 441, Ex. Ch. Where a partial loss arises, not from the perils insured against, but from the vice of the subject of insurance, though this was not known to the assured, the insurers are not liable. *Fawcus v. Sarsfield*, *supra*; see also *Steel v. State Line S. Ship Co.*, 3 Ap. Ca. 72, D. P.

Where a question arises as to the seaworthiness of a ship, ship-builders, though they have never seen the ship, may state their opinion on examining a survey taken by others, it being a matter of skill and science. *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. R. Exch. Assur. Co.*, Peake, 25, *vide ante*, pp. 165, 166.

Where the policy expressly admits seaworthiness, the underwriter cannot dispute it, even where the loss was by reason of unseaworthiness. *Parfitt v. Thompson*, 13 M. & W. 392.

Deviation.] A deviation from the voyage insured is a defence to an action on the policy, as being a breach of an implied warranty on a voyage policy; even although the degree or period of risk is not thereby increased, for the assured has no right to substitute a different risk. *African Merchants, Co. of, v. British & Foreign Marine Insur. Co.*, L. R. 8 Ex. 154, 157, Ex. Ch. In this case the policy was partly a voyage and partly a time policy. Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured, and the policy does not attach; *Wooldridge v. Boydell*, 1 Doug. 16; but, where the ultimate *termini* of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but, before the arrival at the dividing point, there is no more than an *intention* to deviate, which alone will not vitiate the policy. *Kewley v. Ryan*, 2 H. Bl. 343; *Hare v. Travis*, 7 B. & C. 14. It is a deviation avoiding the policy to slacken sail for the purpose of acting as convoy to a prize. *Lawrence v. Sydebotham*, 6 East, 45; or, to take a vessel in tow. *Scaramanga v. Stamp*, 5 C. P. D. 295, C. A. But, a deviation for the purpose of saving life is not a forfeiture of the policy; *secus*, if for the mere purpose of saving property. *S. C.* All deviations by reason of inevitable accident or stress of weather, to obtain needful pro-

visions, or do needful repairs, or avoid capture, are implied exceptions to the warranty. 3 Kent, Com. 316, 317; *per cur.*, in *Urquhart v. Barnard*, 1 Taunt. 456; *O'Reilly v. Gonne*, 4 Camp. 249. A deviation does not discharge the insurer from liability for previous loss, but, only from loss accruing after the deviation. *Green v. Young*, 2 Ld. Raym. 840; 2 Salk. 444. If there be in the policy liberty to touch at several named ports, and the order of touching is specified in it, that must be followed, otherwise they must be visited in the order usual on similar voyages, unless circumstances justify a different order. *Gairdner v. Senhouse*, 3 Taunt. 16; 3 Kent, Com. 314, 315. Where the policy was "at and from B. A. and port or ports of loading in the province of B. A.," and the vessel went to L. in the province to load, and not getting a full cargo there, returned to B. A. to complete her cargo, and on the voyage there was lost; it was held that there had been no deviation; though it would have been otherwise had the vessel once started from L. on her way home. *Harröwer v. Hutchinson*, L. R., 4 Q. B. 523. The judgment was reversed on other grounds in L. R., 5 Q. B. 584, Ex. Ch.

In the case of an insurance "at and from a port," an unreasonable delay of the ship in reaching the port, so that the risk is varied, will prevent the policy from attaching. *Mount v. Larkins*, 8 Bing. 108; *De Wolf v. Archangel Insur. Co.*, L. R., 9 Q. B. 451. So, where the delay is after the risk has attached, and is not caused by the perils insured against, it is in the nature of a deviation, and the underwriter is discharged. *Palmer v. Marshall*, 8 Bing. 79, 317. Unreasonable delay is properly a question for the jury. *Palmer v. Marshall*, *supra*; *Hamilton v. Sheddou*, 3 M. & W. 49. But, in case of a *seeking* ship, much greater latitude for the seeking adventure must be allowed. *Phillips v. Irving*, 7 M. & Gr. 325.

[*Full disclosure.*] See *post*, p. 404, *et seq.*, *Concealment*.

[*Other implied warranties.*] There is no implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented; therefore, where the captain neglected to mention the goods in the ship's manifest, as required by 13 & 14 Car. 2, c. 11, &c., this was held no defence by the underwriter against the owner of the goods. *Carruthers v. Gray*, 3 Camp. 142. Nor, does the owner of goods warrant that the ship shall not change her nationality, although the loss is occasioned by such change. *Dent v. Smith*, L. R., 4 Q. B. 414. Goods must be properly stowed; but lading them on deck is not necessarily improper, as some writers have supposed. *Milward v. Hibbert*, 3 Q. B. 120.

[*Licence.*] Where the voyage has been legalised by a licence, such licence must be produced unless lost, when oral evidence of its contents is admissible. *Kensington v. Inglis*, 8 East, 288. But, where a licence was granted by the Secretary of State in this country pursuant to 48 Geo. 3, c. 126, oral evidence was excluded on the ground that there must have been some register of it preserved in the office of the Secretary of State, which would be better than oral evidence. *Rhind v. Wilkinson*, 2 Taunt. 237. By the above-mentioned statute a duplicate of the order in council, authorising the grant of the licence, is to be annexed to it; where, therefore, the licence was lost, examined copies of the order in council from the council books and of the licence in the office of the Secretary of State were held to be the only proper evidence. *Eyre v. Palgrave*, 2 Camp. 605. Proof that a vessel warranted to carry a French licence remained at Bordeaux a month after the inspection of a document purporting to be a French licence, and of other

documents, by the officers of the French Government, is *prima facie* evidence that the document is genuine. *Everth v. Tunno*, 1 Stark. 508. Where the licence is general some evidence must be given to apply it to the voyage in question. *Barlow v. M'Intosh*, 12 East, 311. On proof that goods, which cannot be exported without a licence, were duly entered for exportation at the custom-house, it was presumed, in action against the shipowner, that there was a licence to export them. *Van Omeron v. Dowick*, 2 Camp. 44.

Proof of loss—Perils of the sea.] If the insurance is with the words "lost or not lost" it will attach, although the subject-matter had been in fact lost at sea at the time of insurance, provided the party insured was at the time ignorant of the loss. 3 Kent, Com. 258, 259; *Mead v. Davison*, 3 Ad. & E. 303.

The proximate and not the remote cause of loss is to be regarded, and any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent actions of some other cause which is not within it. *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, D. P.; *W. India Telegraph Co. v. Home & Colonial Insur. Co.*, 6 Q. B. D. 51, C. A. But, where the insurance is against perils of the sea, and mischief is occasioned by the sea, the natural and unavoidable consequence of which is to cause a further mischief, this consequential injury is also a peril of the sea; as, where the sea-water damages part of a cargo, which thereby becomes putrid, so as to injure another part of the cargo in contact with it. *Montoya v. London Assur. Co.*, 6 Exch. 451; 20 L. J., Ex. 254. Where, however, the goods were not actually damaged, but sold for less because they had formed part of a cargo of goods which were damaged: this loss was held not to be within the policy. *Cator v. Gt. W. Insur. Co. of New York*, L. R., 8 C. P. 552. A loss by perils of the seas, though remotely occasioned by the negligence of the crew, is within the policy. *Walker v. Maitland*, 5 B. & A. 171; *Bishop v. Pentland*, 7 B. & C. 219; *Shore v. Bentall*, 7 B. & C. 798, n. So, a loss occasioned by the mistake of the master, provided he was a person of competent skill when the policy was effected. *Phillips v. Headlam*, 2 B. & Ad. 380. So, though the ship was damaged by negligent loading, and became leaky, and was run ashore to prevent sinking. *Redman v. Wilson*, 14 M. & W. 476. A loss, occasioned by running foul of another vessel by misfortune, is a loss by the perils of the seas. *Buller v. Fisher*, 3 Esp. 67. So, if the ship was run down by another ship, though through gross negligence on the part of the other ship. *Smith v. Scott*, 4 Taunt. 126. So, where the vessel is wrecked in consequence of the gross misconduct of the master. *Heyman v. Parish*, 2 Camp. 149. Where a portion of the goods was saved from the wreck and got on shore, but they were plundered by the natives and never came to the hands of the owners, this is a loss by perils of the sea. *Bondrett v. Hentigg*, Holt, N. P. 149. So, where the insurance was on gold, and the ship was stranded abroad, and the gold was taken charge of by the foreign authorities; expense was incurred in vainly endeavouring to get the ship off, and the authorities having apportioned the expense between the parties, refused to give up the gold until the share of expense due from the plaintiffs had been paid; it was held that the amount so paid by them was a loss by perils of the seas, for whether the charge was legal or not, a *vis major* prevented the plaintiffs obtaining the gold without paying the sum, and this was the immediate consequence of the wreck. *Dent v. Smith*, L. R. 4 Q. B. 414. So, on an insurance on goods, where the ship was stranded and utterly disabled from proceeding, and while she lay in the sand was seized and confiscated by the foreign authorities. *Hahn v. Corbett*, 2 Bing. 205.

But, if the ship be merely temporarily disabled, and afterwards seized, this is a total loss by capture, and if this be an excepted risk, the insured cannot recover for the previous partial loss by perils of the sea. *Livie v. Janson*, 12 East, 648. Several thousand bags of coffee were insured against perils of the sea, with warranty against capture, and all the consequences of hostilities; the captain, misled by the extinction of a light, owing to hostilities between two neighbouring states, ran the ship ashore, and she was lost; 120 bags of the coffee were saved by salvors, and 1,000 bags more would have been saved but for the interference of one of the hostile parties, after which the ship went to pieces: it was held that the underwriters were liable for a partial loss; for that the cause of the wreck was perils of the sea, and that the putting out the light, though an act of hostility within the exception, was too remotely connected with the loss to be taken as the cause; but that the loss of the 1,000 bags was within the exception. *Ionides v. Universal Marine Ass.*, 14 C. B., N. S. 259; 32 L. J., C. P. 170. Where the insurance was on cattle warranted free from mortality, and they in the course of the voyage were killed by the rolling of the ship in a storm; this was held a loss by the perils of the seas. *Lawrence v. Aberdeen*, 5 B. & A. 107. So, under a similar policy, where the horses, owing to a storm, broke down the partitions, &c., between them, and so kicked and injured each other that they died. *Gabay v. Lloyd*, 3 B. & C. 793. But, where the voyage is retarded by tempestuous weather, and the delay so occasioned causes the insured cargo to become putrid, so that it is necessarily thrown overboard, this is not a loss occasioned by "perils of the seas," or by "other perils." *Taylor v. Dunbar*, L. R., 4 C. P. 206. See also *Tatham v. Hodgson*, 6 T. R. 656.

A transport was insured for 12 months, during which she was ordered into a dry harbour the bed of which was uneven, where, the tide having left her, she received damage from an unusual sea swell; this was held a loss by perils of the sea. *Fletcher v. Inglis*, 2 B. & A. 315. But, if the damage be occasioned merely by the ship taking the ground on the ordinary reflux of the tide, this is not a peril of the sea. *Magnus v. Buttemer*, 11 C. B. 876; 21 L. J., C. P. 119. So, where a ship was hove down upon a beach within the tideway to repair, and the tide rising, she was bilged and damaged; it was held not to be a loss by the perils of the seas. *Thompson v. Whitmore*, 3 Taunt. 227; *Phillips v. Barber*, 5 B. & A. 161.

Where a ship sinks from her own inherent weakness, and not from any external violence, this is not a loss by perils of the sea. *Merchant's Trading Co. v. Universal Marine Co.*, cited L. R., 9 Q. B. 596. See also *Anderson v. Morice*, and *Dudgeon v. Pembroke*, cited *ante*, p. 388. So, where a ship became so injured by worms during her voyage as to be unable to proceed, and was condemned as irreparable, this is not a loss by perils of the seas. *Rohl v. Parr*, 1 Esp. 445.

An insurance against "perils of the sea" does not cover an injury resulting from the ordinary chemical action of the sea-water upon an article exposed to the action in such a state as inevitably to receive injury from it; *Paterson v. Harris*, 1 B. & S. 336; 30 L. J., Q. B. 354; nor from damage arising from the nature and collocation of the cargo; *The Freedom*, L. R., 3 P. C. 594.

Where two ships were injured by collision, and the owners of one were in consequence compelled by a court of admiralty to pay damages, this was held not a loss by perils of the seas; nor, could they recover the extra expense of maintaining the crew whilst the ship was under repair, owing to damage by the sea. *De Vaux v. Salvador*, 4 Ad. & E. 420. It has, in consequence, become the frequent practice to add what is called a collision clause in modern policies, making the underwriters liable for any damages

that the shipowner may have to pay, owing to the ship having come into collision with another ship; but this will not extend to the costs the ship-owners incur in successfully defending a collision suit brought against them; *Xenos v. Fox*, L. R., 3 C. P. 630; in Ex. Ch., L. R., 4 C. P. 665; nor, to liability for personal injury, occasioned on board the other ship, unless expressly so extended; *Taylor v. Dewar*, 5 B. & S. 68; 33 L. J., Q. B. 141; and, where goods are lost through a collision occasioned by negligence of the crew, this is not a loss by perils of the sea, or by barratry of masters or mariners, accident, or damage of the seas; *Grill v. General Iron Screw Colliery Co.*, L. R., 3 C. P. 476, Ex. Ch. See further, *post*, p. 426.

Where a ship was disabled by perils of the seas from pursuing her voyage, and the master, having no other means of defraying the expense of repairs, sold part of the goods insured, and applied the proceeds towards the expense, it was held that this was not a loss of the goods by perils of the seas. *Powell v. Gudgeon*, 5 M. & S. 431; *Sarguy v. Hobson*, 2 B. & C. 7; S. C. in Ex. Ch., 4 Bing. 131; 1 Y. & J. 347. So, when in a like case the master, in order to repair, raised money on a bottomry bond, which the owner of the goods was forced to pay in order to avoid their being sold. *Greer v. Poole*, 5 Q. B. D. 272; see also *Philpot v. Swann*, 11 C. B., N. S. 270; 30 L. J., C. P. 358, cited *post*, p. 398. A ship was wrecked, sunk, and sold by the owner and master after a survey by captains approved by the agent of Lloyd's: two days afterwards she was got clear off by the purchaser and repaired, but at great expense, and she might then have returned to England in ballast, or with certain kinds of cargo. *Ld. Tenterden* held, that not only must the owner act honestly, but that the underwriters were not liable unless he formed the best and soundest judgment that could be formed under the circumstances, and, that if the ship could have been brought to England, even in ballast, so as to have repaid the money expended in repairs, they ought to have been made by the captain; and he left it to the jury to say, whether the captain exercised a sound judgment, as well for the benefit of the underwriters, as for the owners. *Doyle v. Dallas*, 1 M. & Rob. 48. See *Gardner v. Salvador*, *Id.* 116, and *Cobequid Marine Insur. Co. v. Barteaux*, L. R., 6 P. C. 319. The question is, whether he actually exercised a sound judgment; and proof of his inability to do so by reason of habits of drunkenness or otherwise, is legitimate evidence. *Alcock v. R. Exch. Assur. Co.*, 13 Q. B. 292. If a ship, agreed to be seaworthy, is damaged by a storm, so that the expense of repair will exceed the value of the ship when repaired, it is a total loss by perils of the seas, though the ship was an old and partially decayed one, and the expense would, on that account, be increased. *Phillips v. Nairne*, 4 C. B. 343. See *Grainger v. Martin*, and other cases, *post*, pp. 397, 398.

A ship, never heard of after sailing, is presumed to have foundered at sea. *Green v. Brown*, 2 Str. 1199; *Newby v. Read*, Park's Ins., 8th edit., 148. It is sufficient to prove that the ship has not been heard of in the country from which she sailed, without calling witnesses from the port of destination to prove that she never arrived there. *Twemlow v. Orwin*, 2 Camp. 85. The time within which a missing ship will be presumed lost must depend on the circumstances of the case. In *Houstman v. Thornton*, Holt, N. P. 242, a ship which had sailed on a 7 weeks' voyage, and had not been heard of for 8 or 9 months, was presumed to be lost. Where it was proved that the vessel (a foreign one, and trading between foreign ports) sailed on the voyage insured with the goods on board, but had never arrived at her port of destination, and that a report prevailed at the place whence she sailed that she had foundered at sea, but that the crew were saved—this was held sufficient *prima facie* evidence of a loss by the perils of the seas, and the plaintiff wa

held not bound to call any of the crew, or to show that he was unable to procure their attendance. *Koster v. Reed*, 6 B. & C. 19.

Where a power to the charterer, for certain causes at his discretion, to retain freight due, is lawfully exercised by him on account of the happening of a sea peril, the freight is not thereby lost by perils of the sea. *Inman Steamship Co. v. Bischoff*, 7 Ap. Ca. 670, D. P.

Proof of loss by fire.] Proof that the ship was burned by the captain to prevent her falling into the hands of the enemy, is evidence of a loss by fire. *Gordon v. Rimmington*, 1 Camp. 123. So, though the ship was burned by the negligence of the master and mariners, this is a loss by fire. *Busk v. R. Exch. Assur. Co.*, 2 B. & A. 73. But, on an insurance on goods, if the goods are burnt in consequence of being put on board in bad condition, this, being occasioned by the insurer's own act, would not be a loss by fire within the policy. *Boyd v. Dubois*, 3 Camp. 133. Where a fire insurance was on a ship described as "lying in the V. Docks, with liberty to go into a dry dock and light the boilers once or twice during the currency of the policy;" it was held that the ship was not covered while she was in the river for any other purpose than to pass from the V. Docks to a dry dock, and *vice versa*. *Pearson v. Commercial Union Assur. Co.*, 1 Ap. Ca. 498, D. P. See also *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 668, Ex. Ch.; *Wingate v. Foster*, 3 Q. B. D. 582, C. A.

Proof of loss by capture.] Where a vessel is driven by a gale of wind on an enemy's coast without damage, and there captured, it is a loss by capture; *Green v. Elmslie*, Peake, 212; see *Ionides v. Universal Marine Ass.*, *ante*, p. 391; *aliter*, if lost by stranding before the capture; *Hahn v. Corbett*, *ante*, p. 390. The books at Lloyd's have in some cases been received as evidence of a capture; but, not of notice of the loss to the underwriter. *Abel v. Potts*, 3 Esp. 242; *Fowler v. English, &c. Insur. Co.*, *infra*. A foreign sentence of condemnation is not evidence of a capture; but, after other proof of a capture, it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 Camp. 69. If a ship after capture, without abandonment, is restored so as to be in a condition to pursue the voyage insured, and is afterwards lost on another voyage, the plaintiff cannot recover for a total loss by capture. *Kulen Kemp v. Vigne*, 1 T. R. 304. A re-capture may convert a total into a partial loss. *Thellusson v. Shedden*, 2 N. R. 228, 230. But, where the insurance was on a ship against those risks only that are excluded by the warranty free from capture, seizure, and detention, and with the stipulation that the insurers should pay a total loss 30 days after news of capture or embargo, and the ship had been detained by an embargo, it was held that the assured might claim a total loss at the expiration of the 30 days, although the ship had been restored to the assured after action brought. *Fowler v. English and Scottish Marine Insur. Co.*, 18 C. B., N. S. 919; 34 L. J., C. P. 253. Proof of a capture by collusion with the captain will support an averment of loss by capture. *Arcangelo v. Thompson*, 2 Camp. 620. Insurance of a French ship in England during peace will not avail against British capture after war declared with France. *Furtado v. Rodgers*, 3 B. & P. 191. Whether the words "capture or seizure" occur in the policy or in a warranty excepting them, capture by a foreign force under error is within the words; and the fact that the ship is sunk by the captor's guns does not make it less a capture. *Powell v. Hyde*, 5 E. & B. 607; 25 L. J., Q. B. 65. So, where the ship is seized and detained for smuggling, amounting to a barratrous act of the master. *Cory v. Burr*, 9 Q. B. D. 463, C. A.; 8 Ap. Ca. 393. So, a warranty "free from capture and seizure, and the consequences of any attempt thereat," includes a piratical carrying away of the

ship by passengers. *Kleinwort v. Shepard*, 1 E. & E. 447; 28 L. J., Q. B. 147. So, a seizure of the ship by savages for the purposes of plunder. *Johnston v. Hogg*, 10 Q. B. D. 432. Loss is total, if the assured can only avert a sale ordered by a prize court, pending an appeal, by giving bail which a prudent uninsured owner would not have given. *Stringer v. English Insur. Co.*, L. R., 4 Q. B. 676; L. R., 5 Q. B. 584, Ex. Ch.

As to a breach of neutrality and the evidence thereof, see *Hobbs v. Henning*, 17 C. B., N. S. 791; 34 L. J., C. P. 117.

Proof of loss by restraint of princes, &c.] In an insurance in the usual form against the restraint of all princes, &c., is included a loss consequent on a seizure, under an embargo for a temporary purpose by the government of the country of the assured, that country and the country of the assurer being at peace, and the embargo being unconnected with any hostility existing or expected between the two countries; for the assured is not so identified with the acts of the government of his country as to make their acts his own; *Aubert v. Gray*, 3 B. & S. 163; 32 L. J., Q. B. 50; Ex. Ch., overruling *Conway v. Gray*, 10 East, 536; *sed quære*, whether if the act of seizure were a lawful act under the municipal law of the country of the assured, the seizure would as against him be within the insurance. A wrongful seizure as a slaver, comes within this clause; and notice of abandonment makes the loss total; and, though after long litigation and judgment of restitution the goods still remain in specie, a reasonable man could not be expected to be willing to retain possession, and therefore the loss remains total. *Lozano v. Janson*, 2 E. & E. 160; 28 L. J., Q. B. 337.

A ship was to be loaded with corn at I., under a charter-party, with usual exception of the restraint of princes, &c.; it was proved that no corn had been exported from I. during the vessel's stay, and evidence was given to show that W., where I. was situate, was invaded by the Russians, and their general, G., had refused to allow grain to be exported, and had referred the applicant elsewhere; evidence was also tendered of copies of placards in the name of G., posted on the walls of I., at the period of the ship's arrival, prohibiting the exportation of grain; it was held that such evidence was admissible, and proved a plea of the exception. *Bruce v. Nicolopulo*, 11 Exch. 129; 24 L. J., Ex. 321. This exception in a bill of lading for goods shipped in a Russian port, on board a Mecklenburg ship, for a port in this country, means at least the enemies of the Duke of Mecklenburg, the sovereign of the carrier. *Russell v. Niemann*, 17 C. B., N. S. 163; 34 L. J., C. P. 10; *The Heinrich*, L. R., 3 Adm. 424. The act of closing the ports by an enemy is "a prohibition of export preventing loading." *Adamson v. Newcastle, &c. Insur. Assoc.*, 4 Q. B. D. 462.

The hostile detention of goods within a besieged town is a restraint of princes. *Rodocanachi v. Elliott*, L. R., 8 C. P. 649; L. R., 9 C. P. 518, Ex. Ch. Siege and blockade are within the same principle in this respect. *S. C. Geipel v. Smith*, L. R., 7 Q. B. 404.

Proof of loss by barratry.] Barratry is any fraudulent or criminal conduct by master or mariners against the owner of the ship or goods. *Earle v. Rowcroft*, 8 East, 126; *Cory v. Burr*, *ante*, p. 393. Therefore, the act of the owner is not barratry. Evidence that the person, who was described in the policy and acted as master of the ship, carried her out of her course for fraudulent purposes of his own, is *prima facie* evidence of barratry without negative proof that he was not the owner. *Ross v. Hunter*, 4 T. R. 33. Where, however, the whole ship is let, the freighter is owner *pro hinc vice*, and barratry may then be committed, even with the consent of the general

owner. *Vallejo v. Wheeler*, Cowp. 143; *Soares v. Thornton*, 7 Taunt. 627. Smuggling by the captain, on his own account, will be evidence of barratry. *Lockyer v. Offley*, 1 T. R. 252; *Cory v. Burr*, ante, p. 393. But, if by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable. *Pipon v. Cope*, 1 Camp. 434. Proof that prisoners of war rose and confined all the crew and put them on shore except one, who was heard on the deck in conversation with them, is evidence of barratry. *Hucks v. Thornton*, Holt, N. P. 30. Where a ship is lost through the negligent steering of the master, whereby she was run into and sunk, this is not barratry. *Grill v. General Iron Screw Colliery Co.*, L. R., 3 C. P. 476, Ex. Ch.

Proof of loss by "other perils."] The general insurance against "all other perils, losses, and misfortunes," covers cases of marine damage of like nature as those enumerated, e.g. injury caused to a steamer by the explosion of her boiler. *W. India and Panama Telegraph Co. v. Home and Colonial Marine Insur. Co.*, 6 Q. B. D. 51, C. A. It does not cover cases of ordinary wear and tear, or damage resulting from ordinary occurrences of a sea voyage, such as loss of anchors, friction of rocks, leakage, worms, rats, &c., for these are not the extraordinary and fortuitous perils of the sea. 3 Kent, Com. 300; *Kay v. Wheeler*, L. R., 2 C. P. 302. Of this kind, is the damage done to a ship in harbour by the ordinary flux or reflux of the tide; *Magnus v. Buttemer*, 11 C. B. 876; 21 L. J., C. P. 119; unless occasioned by an unusual swell or other accident. *Phillips v. Barber*, 5 B. & A. 161; see ante, p. 391. But, the case of a vessel sunk by an English ship of war firing into her by mistake, was held to be a loss within the general words, though *semble*, not by "perils of the sea." *Cullen v. Butler*, 5 M. & S. 416. So, injury occasioned to the cargo by sea-water which flowed down the discharge pipe of the vessel, and through some valves which had been negligently left open, while the cargo was being loaded in harbour, was held to be covered by the clause in the policy against "other perils," if not a loss occasioned by "perils of the sea." *Davidson v. Burnand*, L. R., 4 C. P. 11.

Proof of stranding.] The memorandum, usual in policies on goods, to protect the insurers from claim for loss on certain articles, or from liability to particular average, "unless the ship be stranded," raises the question as to what is "stranding" within the memorandum. If there be a stranding, then the policy applies, although the loss or injury to the excepted articles was not really caused by it. *Wells v. Hopwood*, 3 B. & Ad. 34, 35, per Ld. Tenterden. Where goods are insured free from average, unless general, or the ship be stranded, before the plaintiff can recover for a partial loss the stranding must be proved. A striking is not sufficient, if it is merely temporary, as for a minute and a half; in order to constitute a stranding, the ship must be stationary for some time. *M'Dougle v. R. Exch. Assur. Co.*, 4 Camp. 283; 4 M. & S. 503. But, where the ship was fixed from 15 to 20 minutes, it was held a stranding. *Baker v. Towry*, 1 Stark. 436. If a ship is forced ashore, or is driven on a bank and remains for any length of time on the ground, as for 2 hours, this is a stranding without reference to the degree of damage she sustains. *Harman v. Vaux*, 3 Camp. 431. "A stranding," says Bailey, J., "may be said to take place where a ship takes the ground not in the ordinary course of the navigation, but by reason of some unforeseen accident." *Bishop v. Pentland*, 7 B. & C. 224; accord. *Wells v. Hopwood*, 3 B. & Ad. 20, post, p. 396.

Where a ship, under the conduct of a pilot, in her course up the river to L. was, against the advice of the master, fastened at the pier of the dock

basin by a rope to the shore, and left there, and took the ground, and when the tide left her fell over on her side and bilged; this was held to be a stranding. *Carruthers v. Sydebotham*, 4 M. & S. 77. So, where in the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water, and the ship in consequence, although she had been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there—it was held a stranding. *Rayner v. Godmond*, 5 B. & A. 225. So, where in the course of the voyage, the ship was by tempestuous weather forced to take shelter in a harbour, and upon entering it struck upon an anchor, and being brought upon her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground, and remained fast for half an hour—the stranding was held to be proved. *Barrow v. Bell*, 4 B. & C. 736. A ship was compelled in the course of her voyage to put into a tidal harbour, and was there moored alongside a quay in the usual place for such ships. The rope with which she was fastened, not being of sufficient length, broke when the tide left the vessel, and she fell over upon her side, and was thereby greatly injured:—held to be a stranding, though occasioned remotely by the negligence of the crew; the falling over was not in the ordinary course of the voyage, but in consequence of an unforeseen accident out of the ordinary course of the voyage, viz., the breaking of the rope. *Bishop v. Pentland*, 7 B. & C. 219.

But, where the taking the ground is in the ordinary course of navigation, and no more than is usual with the vessel on the same voyage, it is not a stranding, though the vessel or goods are injured by it. *Hearne v. Edmunds*, 1 B. & B. 388. "Where a vessel takes the ground, in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as stranding within the sense of the memorandum. But, where the ground is taken under any extraordinary circumstances of time or place by reason of some unusual or accidental occurrence, such an event shall be considered as a stranding within the meaning of the memorandum." *Wells v. Hopwood*, 3 B. & Ad. 34, per Ld. Tentertden. Where the vessel, in the course of discharging her cargo in a tidal harbour, on one occasion grounded, not on the mud as was intended, but on a heap of stones, owing to one of her mooring ropes breaking, and the wind blowing at the time from a particular quarter: this was held to be "a stranding." S. C. So, where intentional grounding causes the ship injury, owing to the bottom of the harbour being in an unusual condition. *Letchford v. Oldham*, 5 Q. B. D. 538, C. A. But, where upon the ebbing of the tide, the vessel took the ground in a tidal harbour in the place where it was intended she should, but in so doing, struck against some hard substance by which two holes were made in her bottom: this was held to be no stranding. *Kingsford v. Marshall*, 8 Bing. 458. In *Corcoran v. Gurney*, 1 E. & B. 454; 22 L. J., Q. B. 113, the ship was forced by stress of weather to take a tidal harbour, where, it being low water, she took the ground, and only floated about 6 days in a month at the top of the spring tides, being unable to leave the harbour for 2 months, owing to contrary winds: this was held a stranding, the court adopting the above definition in *Wells v. Hopwood*, *supra*. See also *De Mattos v. Saunders*, L. R., 7 C. P. 570.

In order to bring the case within the stranding, mentioned in the memorandum as to partial loss, it must appear that the goods were on board at the time: thus, where hides became putrified from leakage, and were sold in the course of the voyage at an intermediate port, and the ship was after-

wards stranded, it was held that the stranding was not within the condition in the memorandum. *Roux v. Salvador*, 1 N. C. 526. The stranding must be of the ship itself, and although the insurance includes risk of craft, &c., the stranding of a lighter conveying the goods from the ship will not make the insurers liable. *Hoffman v. Marshall*, 2 N. C. 383.

Proof of loss ; total or partial.] A loss may be total or partial, and a total loss may be either actual or constructive. A loss is said to be total if the thing insured is either totally destroyed, or is so damaged as to be worthless and the adventure thereby wholly frustrated. *Roux v. Salvador*, 3 N. C. 266. It is a constructive total loss if the thing insured, though still existing in fact, is lost for all useful purposes, so as to justify the insured in abandoning all his interest in it to the insurer and claiming as for a total loss. Where the loss is *actually* total, no abandonment is necessary to found a claim. *Roux v. Salvador*, *post*, p. 399 ; 3 Kent, Com. 318. Thus, stranding is not a total loss, and may not be the foundation of any claim at all ; but, if the ship become thereby unnavigable, by reason of the impossibility of getting her afloat, or the great expense of doing so, the loss may be converted into a total one by abandonment. 3 Kent, Com. 323. So, where a ship is on the voyage so damaged that she would cost more to repair so as to fit her to complete the voyage than she would be worth when repaired. *Kemp v. Halliday*, 6 B. & S. 723 ; 34 L. J., Q. B. 223 ; L. R., 1 Q. B. 520 ; 6 B. & S. 757, Ex. Ch. If a ship and cargo be sunk in deep water, so that the cargo could only be saved by raising the ship, in calculating the expense of raising the ship in order to ascertain whether there is a constructive total loss, the general average contribution to be made by the cargo must be deducted from such expense. S. C. To determine whether there is a constructive total loss of goods injured by perils insured against, the jury must find whether it would cost more to carry on the goods than they were worth, and to find this they must take into account the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping them, but must not deduct the original bill of lading freight. *Farnworth v. Hyde*, L. R., 2 C. P. 204, Ex. Ch.

A loss is total and no abandonment is necessary where the ship is lost, or destroyed, or captured, or reduced to a mere wreck or congeries of planks, so as not to exist as a ship for any useful purpose. *Cambridge v. Anderton*, 2 B. & C. 691 ; *Farnworth v. Hyde*, 18 C. B., N. S. 835 ; 34 L. J., C. P. 207. This last case was reversed in the Ex. Ch. (*ubi supra*), but that court pronounced no opinion upon the point in question. See also *Barker v. Janson*, L. R., 3 C. P. 303, 305. So, in the case of goods where they have become putrid, and are sold at an intermediate port, being unfit to be carried further. *Roux v. Salvador*, 2 N. C. 266, 288, Ex. Ch. In some cases of damage by sea the owners may be justified in selling the ship and claiming for total loss ; in such cases the question for the jury will be, whether the sale was justified by necessity, and was for the benefit of *all* parties, and the net amount of the sale becomes money received for the insurer. *Roux v. Salvador*, *supra* ; *Doyle v. Dallas*, 1 M. & Rob. 48 ; *Gardner v. Salvador*, *Id.* 116 ; *vide ante*, p. 392. In order to make out a constructive total loss, the plaintiff must show affirmatively, that the cost of repair would have exceeded the value of the ship when repaired : and where the ship is of an exceptional size, the price she would fetch in the market when repaired is not the test of her real value. *Gravinger v. Martin*, 2 B. & S. 456 ; 31 L. J., Q. B. 186 ; S. C. in Ex. Ch., 4 B. & S. 9. See also *Young v. Turing*, 2 M. & Gr. 593. In the case of insurance on freight, where the ship was disabled before she had completed her lading, and the master went to a distant place for repairs, and finding he could not get them done there, sailed on to the

port of destination without returning for the rest of the cargo, acting throughout as a prudent owner, uninsured, would have done,—it was held that the freight was not lost by perils of the seas. *Philpot v. Swann*, 11 C. B., N. S. 270; 30 L. J., C. P. 358, citing and approving *Mordy v. Jones*, 4 B. & C. 394, and *Moss v. Smith*, 9 C. B. 94; 19 L. J., C. P. 225. In case of sale, by the master of a ship or goods in specie, there must be a clear case of extreme necessity to constitute an *actual* loss without abandonment. Where the thing insured exists in specie, the general rule is that the loss is constructive only, and the assured can only found a claim for total loss by abandonment. *Knight v. Faith*, 15 Q. B. 649; 19 L. J., Q. B. 509; and the cases cited in the judgment. See also the judgment in *King v. Walker*, 3 H. & C. 209; 33 L. J., Ex. 325, Ex. Ch. There is no total loss of freight, merely because there was an injury to the ship by perils of the sea, which cost more to repair than the amount of freight; if the ship itself was worth repairing. *Moss v. Smith*, *supra*. See further as to what amounts to a total loss of freight. *Potter v. Rankin*, L. R., 6 H. L. 83; *Allison v. Bristol Marine Insur. Co.*, 1 Ap. Ca. 209, D. P. Where a cargo was partially lost by sea perils insured against, and the residue sold, by order of the Court of Admiralty, in course of proceedings instituted by the salvors, the whole proceeds being absorbed in payment of costs, it was held that there was no total loss, the sale being too remote a consequence of the sea perils. *De Mattos v. Saunders*, L. R., 7 C. P. 570. Where freight is eventually earned, although paid to the obligees of a bottomry bond (by a decree of the Admiralty), which the master has been obliged to enter into in order to get money necessary for repairs, the ship-owner cannot claim either for total or partial loss of freight. *Benson v. Chapman*, 8 C. B. 950; 2 H. L. C. 696. A loss, which by abandonment might become total, may become a partial loss only by subsequent events, as by recapture, release from detention, &c., before action. 2 Wms. Saund. 203 i, (f).

As to loss, where the insurance is effected on special adventures, *e.g.*, the successful laying of a submarine telegraph cable, see *Wilson v. Jones*, L. R., 1 Ex. 193; L. R., 2 Ex. 139, Ex. Ch.

An insurance "against total loss only" does not exclude a constructive total loss. *Adams v. Mackenzie*, 13 C. B., N. S. 442; 32 L. J., C. P. 92. But, the doctrine of constructive total loss does not apply to a bottomry bond; *Broomfield v. S. Insur. Co.*, L. R., 5 Ex. 192; for, the doctrine does not apply so as to avoid the bond; *The Great Pacific*, L. R., 2 P. C. 516.

Where the plaintiff's goods, by the perils insured against, are damaged, and get so mixed, with the similar goods of other persons, that they cannot be identified, the owners become tenants in common of the goods in the proportion of the respective quantities they each had, and there is no actual or constructive total loss. *Spence v. Union Marine Insur. Co.*, L. R., 3 C. P. 427.

In the case of loss to goods, not in its inception total, the claim to indemnity does not arise, until it can be ascertained what is the amount of the injury sustained. *Browning v. Provincial Insur. Co. of Canada*, L. R., 5 P. C. 263.

Proof of loss—Abandonment.] The cases in which abandonment is necessary have been thus described:—There may be a capture which, though *prima facie* a total loss, may be followed by recapture. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing ship or goods to their destination. There may be some other peril which renders the ship unseaworthy, without reasonable hope of repair, or by which goods are partly lost, or so damaged

as not to be worth the expense of bringing them to their destination. In these or similar cases, if a prudent man, not insured, would decline any further expense in prosecuting the adventure, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of total loss. But, if he elects to do so, the principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives intelligence of the accident. . . . In all these cases the thing assured, or part of it, is supposed to exist in specie, and there is a possibility, however remote, of its arriving at its destination, or of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. *Roux v. Salvador*, 3 N. C. 286, Ex. Ch., *per cur.* "A mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss under a policy of insurance, unless by the aid and effect of an abandonment." *Naylor v. Taylor*, 9 B. & C. 723, *per cur.* In order to justify an abandonment, there must have been that in the course of the voyage which, at the time, constituted a total loss; thus, the desertion of a ship, necessitated at the time by stress of weather, coupled with a notice of abandonment, constitutes a total loss; though the ship be afterwards saved. *Holdsworth v. Wise*, 7 B. & C. 794. Where a cargo of hides, in consequence of a leak, began to putrify, and was sold at an intermediate port for less than a fourth of their value, and it appeared that, if not sold, they could not have arrived at the end of the voyage *as hides*, it was held to be a total loss without an abandonment. *Roux v. Salvador*, 3 N. C. 286, Ex. Ch. See also *Farnworth v. Hyde*, 18 C. B., N. S. 835; 34 L. J., C. P. 207; *Potter v. Rankin*, L. R., 6 H. L. 83. In this last case, the policy was on freight to be earned on a subsequent voyage, and the decision is explained by the C. A. in *Kaltenbach v. Mackenzie*, 3 C. P. D. 467. The mere loss of the voyage, by delay or otherwise, will not warrant the abandonment of ship or cargo, if either remain in specie. *Anderson v. Wallis*, 2 M. & S. 240; *Falkner v. Ritchie*, *Id.* 290; *Hunt v. R. Exch. Assur. Co.*, 5 M. & S. 47. But, where goods are hostilely detained in a besieged town, they may be abandoned. *Rodocanachi v. Elliott*, L. R., 8 C. P. 649; L. R., 9 C. P., 518, Ex. Ch.

An abandonment may be made orally; but, it should be certain; and therefore a statement of the facts with a request to settle for a total loss, and to direct the disposal of the ship, has been held insufficient. *Parmeter v. Todhunter*, 1 Camp. 541. So, the communication to the underwriters of a letter from the captain stating that the ship is, in his opinion, so disabled that it would be better for the interests of all parties to sell her, but that he is taking legal advice, and adding "give the different clubs notice of our position," was held no notice of abandonment. *King v. Walker*, 2 H. & C. 384; 33 L. J., Ex. 167. But, it appearing that another letter had been written by the captain by the next monthly mail, and communicated to the underwriters, in which he announced that he had sold, "give the clubs notice:" that was held a notice of abandonment, and in good time. S. C., 3 H. & C. 209; 33 L. J., Ex. 325; Ex. Ch. The notice of abandonment need not contain the technical word "abandon." *Currie v. Bombay Native Insur. Co.*, L. R., 3 P. C. 72, 79, dissenting on this point from *Ld. Ellenborough* in *Parmeter v. Todhunter*, *supra*. It must be given as soon as possible. *Hunt v. R. Exch. Assur. Co.*, *post*, p. 400; *Potter v. Campbell*, cited L. R., 3 C. P. 304, n.; *Kaltenbach v. Mackenzie*, *supra*. It must be unconditional and unqualified. *M'Masters v. Shoolbred*, 1 Esp. 239. But, an informality or inaccurate statement in it will not vitiate it. *Dean v. Hornby*, 3 E. & B. 180. It must apply to the entire subject of insurance, and not to part only. 2 Wm. Saund. 203 g. (19); 3 Kent, Com. 329. On

the other hand, the underwriter, if he intends to dispute it, is bound to say so, within a reasonable time after receiving notice of abandonment; otherwise he will be taken to have acquiesced in it. *Hudson v. Harrison*, 3 B. & B. 97. Where the assured has elected to treat a seizure as a partial loss, he loses the right of abandoning on the same state of facts, relative to the extent and degree of the operation and effects of the perils insured against. *Stringer v. English Insur. Co.*, L. R., 4 Q. B. 676, 689; L. R., 5 Q. B. 599, Ex. Ch. Silence does not amount to an acceptance of the notice of abandonment, but, where the insurer has, upon receiving the notice, taken possession of the subject-matter insured, he is bound thereby, and cannot afterwards rely on a breach of warranty of which he had notice. *Provincial Insur. Co. of Canada v. Leduc*, L. R., 6 P. C. 224, *per cur.*

A party, jointly interested in the subject-matter of the insurance, and who has effected the insurance, may give notice of abandonment for all; *Hunt v. R. Exch. Assur. Co.*, 5 M. & S. 47. But, the person with whom a policy on a ship has been simply deposited as a security for a loan to the shipowner has no implied authority to give notice of abandonment to the underwriters; and, a notice given by such person cannot enure for the benefit of the shipowner, so as to enable him to recover upon a constructive total loss. *Jardine v. Leathley*, 3 B. & S. 700; 32 L. J., Q. B. 132.

Proof of amount of loss—Adjustment.] If the liability is not disputed, and the policy is an open one, the parties usually proceed to adjust the amount, and this adjustment is an admission of the facts on which the claims are founded, and is evidence against the underwriter of the amount due. It is proved by evidence of his signature, or that of his agent, with proof of the authority of the latter; and it seems that an agent, who has authority to subscribe a policy, has also authority to sign an adjustment of the loss. *Richardson v. Anderson*, 1 Camp. 43, n. But, an adjustment is only *prima facie* evidence against the underwriter, and does not bind him, unless there was a full disclosure of the circumstances of the case; *Shepherd v. Chewter*, *Id.* 274; and fraud opens an adjustment; *Christian v. Coombe*, 2 Esp. 489. A clause may be inserted in the policy, requiring the loss to be adjusted before an action can be maintained on the policy. *Tredwen v. Holman*, 1 H. & C. 72; 31 L. J., Ex. 398. Where the policy provides for payment of losses "as per foreign statement," the parties are bound by the statement made up according to the foreign law. *Harris v. Scaramanga*, L. R., 7 C. P. 481; *Hendricks v. Australasian Insur. Co.*, L. R., 9 C. P. 460; *Mavro v. Ocean Marine Insur. Co.*, *Id.* 595; L. R., 10 C. P. 414, Ex. Ch. See also *Stewart v. W. India, &c. Steamship Co.*, L. R., 8 Q. B. 88, 362. An adjustment does not require a stamp. *Wiebs v. Simpson*, 2 Selw. N. P., 13th ed., 921.

Loss, how to be calculated.] The rule on an open policy is to estimate the actual value of the subject insured at its actual or market value at the commencement of the risk. The object of insurance is merely to put the party *in statu quo*, and not to indemnify him for the loss of prospective profits. 3 Kent, Com. 335. If the claim be on repairs of a ship, the full costs of repair will not be allowed, because the owner substitutes new for old materials. *Poingdestre v. R. Exch. Assur. Co.*, Ry. & M. 378. The usage is, in such case, to deduct a third from the cost of repair; S. C.; *Lohre v. Aitchison*, 4 Ap. Ca. 755, 762, D. P.; unless the ship be on her first voyage; *Pirie v. Steele*, 2 M. & Rob. 49; see *Byrne v. Mercantile Insur. Co.*, 4 H. & C. 506. *Quære*, if this rule extends to iron vessels. See *Lidgett v. Secretan*, L. R., 6 C. P. 616, 627. The assured may recover this proportion of the cost of repair, although such cost amount to more than total loss with

benefit of salvage. *Lohre v. Aitchison*, 4 Ap. Ca. 755, D. P. But, where the assured instead of repairing the ship sells her during the continuance of the risk, the loss recoverable is not this proportion, but, is her depreciation in value, *i.e.*, the difference between the value of the ship, if sound, at the port of distress, and her value there in a damaged state. *Pitman v. Universal Marine Insur. Co.*, 9 Q. B. D. 192, C. A., *diss.* Brett, L.J.

Where the claim is for partial loss, on damaged goods, sold at the destined port, the sum to be paid by the insurer, is to bear the same ratio to the original value at the port of lading, as the gross proceeds of the actual sale, bear, to what would have been the gross proceeds, if the goods had been sound when sold. The expenses of insurance and commission are to form part of the original value in this calculation, and added to the prime cost, or invoice price. *Johnson v. Sheddon*, 2 East, 581; *Usher v. Noble*, 12 East, 639. The payment of freight, is not to be considered, unless the freight be also insured. 3 Kent. Com. 337. Besides the amount subscribed for by the underwriters, they may become liable for average losses, and under the suing and labouring clause, for moneys expended in and about the attempting to save or recover the subject insured, if claimed in the statement of claim; *Le Cheminant v. Pearson*, 4 Taunt. 367; but, not for salvage awarded against the ship; *Lohre v. Aitchison*, 2 Q. B. D. 501; 4 Ap. Ca. 755, D. P., reversing on this point C. A., 3 Q. B. D. 558; 3 Kent. Com. 339, 340.

In an action on insurance of goods, if the declaration alleged the ship to have been sunk, whereby the goods were spoiled, and it appeared that some of the goods were saved, the plaintiff might have given the expense of salvage in evidence, though not specially averred. *Cary v. King*, Cas. t. Hardw. 304; see *Lohre v. Aitchison*, 4 Ap. Ca. 755, 765.

In open policies the assured must prove the extent of his loss; but, in valued policies, if the loss be a total one, he is only bound to prove *some* interest in the ship or goods, in order to take the case out of the statute 19 Geo. 2, c. 37; for, ever since that statute, the constant usage has been to permit the valuation fixed in the policy to stand, unless the defendant can show that the plaintiff had a colourable interest only, or, that he has greatly overvalued the goods. But, where the loss is partial, it opens a valued policy; and the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in the case of an open policy. 2 Wms. Saund. 201 l. (8); *Irving v. Manning*, 1 H. L. C. 287. A ship was insured on a valued time policy; she had, when the policy was made, but unknown to the parties, been so injured by a storm that the expense of repairs would have exceeded the value when repaired; during the continuance of the risk, the vessel was lost: it was held that the underwriters were bound to pay the full amount. *Barker v. Janson*, L. R., 3 C. P. 301. So, where two valued policies were effected with the same underwriters on a ship, one (A.) on an outward, and the other (B.) on the homeward voyage; and, on the outward voyage, the ship sustained damage, which was not entirely repaired, and, after the expiration of the policy A., and while the policy B. was running, was totally destroyed by fire, it was held that the assured might recover, under policy A., the partial loss as it would have been estimated at the expiration of policy A.; and, also under policy B., the value as a total loss. *Lidgett v. Secretan*, *ante*, p. 400. Where, however, during the continuance of one risk there is a partial loss followed by a total loss, the underwriter is liable for the latter only; although he may also be liable under the suing and labouring clause (*vide supra*); S. C., L. R. 6 C. P. 625. The certificate of an agent of Lloyd's is not admissible to prove the amount of damage sustained by goods, though the defendant is a subscriber to Lloyd's. *Drake v. Marryat*, 1 B. & C. 473. Where a policy contained a clause, "the said ship, &c., goods, merchandise,

&c., for so much as concerns the assured by agreement between the assured and assurers in the policy, are and shall be valued as under," the two last words being added in writing; and, some way further down in the policy was written 1300*l.*, and in the body, "on freight free from capture, seizure, &c.;" it was held this was not a valued policy. *Wilson v. Nelson*, 5 B. & S. 354; 33 L. J., Q. B. 220.

In a valued policy, the risk on the goods was to commence on the loading thereof 24 hours after ship's arrival at the coast of Africa; a considerable part of the cargo was not shipped at the time of a total loss, and the part shipped was not equal to the value put upon the goods in the policy—it was held that the valuation was opened, and that the assured was only entitled to recover a proportion calculated on the part of the cargo shipped at the time of the loss. *Rickman v. Carstairs*, 5 B. & Ad. 651. A similar principle was adopted in *Tobin v. Harford*, 18 C. B., N. S. 528; 34 L. J., C. P. 37, Ex. Ch.; and *Denoon v. Home & Colonial Assur. Co.*, L. R., 7 C. P. 341. On a policy on freight, the ship having actually earned full freight, though not that intended for her, the assured cannot recover for the delay and expense as a partial loss. *Brocklebank v. Sugrue*, 1 M. & Rob. 102.

The amount recoverable depends on the value of the thing insured, the sum insured, and the amount of loss; and as the contract of marine insurance is a contract of indemnity merely, where there are several policies on the same risk, and the assured has been paid on some of the policies, he can only recover, on the one in suit, such an amount as with the sums already received will give him indemnity against the loss actually sustained. In ascertaining this loss, in an action on an open policy, the true value of the thing assured is the criterion. But, on a valued policy, the assured can only recover to the amount that the thing is valued in the particular policy; and if he has already received that value on another policy, he cannot recover anything further, although the true value and loss be beyond what he has already received. *Bruce v. Jones*, 1 H. & C. 769; 32 L. J., Ex. 132.

Where by one policy a ship was insured from B. to C., and for 30 days after mooring at C.; and the owners, on hearing the ship had arrived at C., effected another insurance at and from C. to B.; and the ship was during the currency of both policies totally lost at C.; it was held that the second policy was in substitution of the first. *Union Marine Insur. Co. v. Martin*, 35 L. J., C. P. 181.

Where there is an insurance of cargo against jettison, and goods are jettisoned, the underwriters must pay the whole amount insured, without deducting the general average contributions the insured is entitled to receive from the owners of the ship and the rest of the cargo. *Dickenson v. Jardine*, L. R., 3 C. P. 639. When the underwriters have paid the insurance, they are entitled to stand in the place of the insured with respect to general average contributions. *Ibid.* So, where a ship A. has been lost by a collision with a ship B., and the underwriters have paid the full amount of a valued policy on A., they are entitled to receive the damages recovered in the Court of Admiralty against the owners of B. *N. of England Assur. Assoc. v. Armstrong*, L. R., 5 Q. B. 244. See also *Commercial Union Assur. Co. v. Lister*, L. R., 9 Ch. 483; *Simpson v. Thomson*, 3 Ap. Ca. 279, D. P., and cases cited *post*, p. 414. It is otherwise, where a sum is given to the shipowner for the damage he has sustained, as a pure gift. *Burnand v. Rodocanachi*, 6 Q. B. D. 633, C. A.; 7 Ap. Ca. 333, D. P. As to how the loss is to be calculated when the insured goods get so mixed with other goods like them that they cannot be identified, see *Spence v. Union Marine Insur. Co.*, L. R., 3 C. P. 427, cited *ante*, p. 398.

The freight of goods was insured, and the goods were necessarily removed from the ship to allow of repairs being made to her, and they were then forwarded to their destination by rail; the goods might have been transhipped at a much less cost; it was held, that the probable expense of such transhipment was recoverable under the suing and labouring clause. *Lee v. S. Insur. Co.*, L. R., 5 C. P. 397.

Under a policy, effected by the plaintiffs, on their lighters in the Thames, to include all losses, damages, and accidents amounting to 20*l.* and upwards in each craft to goods carried by the plaintiffs as lightermen, and from which losses, &c., the plaintiffs might be liable to the owners thereof; the underwriter is liable to pay the whole loss, without regard to the value of the property at risk. *Joyce v. Kennard*, L. R., 7 Q. B. 78.

Excepted risks "free from average."] We have incidentally seen that there are often clauses excepting certain risks. Thus, there is ordinarily a memorandum by which certain goods are "warranted free from average, unless general, or the ship be stranded" (*ante*, p. 395). An assurance with a warranty, "free from particular average," is equivalent to an insurance against total loss and general average, only; and in such a case, if a ship be disabled from continuing her voyage owing to a peril insured against, and the subject of insurance be forced to be landed, and expense is properly incurred in sending it on by another ship; that is particular average, and the insured cannot recover. *Gt. Indian Peninsula Ry. Co. v. Saunders*, 1 B. & S. 41; 30 L. J., Q. B. 218; 2 B. & S. 266; 31 L. J., Q. B. 206, Ex. Ch.; *Booth v. Gair*, 15 C. B., N. S. 291; 33 L. J., C. P. 99. But, this warranty does not prevent a recovery, under the suing and labouring clause, of expenses incurred in preserving the subject-matter of insurance, and averting a loss; *Kidston v. Empire Marine Insur. Co.*, L. R., 1 C. P. 535; L. R., 2 C. P. 375, Ex. Ch.; in such case the whole expense is recoverable and not a proportionate part only. *Dixon v. Whitworth*, 4 C. P. D. 371; reversed in C. A. on another point, W. N., 1880, p. 43, E. S. But, only such expenses as were incurred in endeavouring to avert a total loss, can be recovered thereunder; *Meyer v. Ralli*, 1 C. P. D. 358. Salvage awarded against the ship in the Admiralty Court is not recoverable under this clause: *Lohre v. Aitchison*, 4 Ap. Ca. 755, D. P.; nor, the costs of the proceedings in that court; *Dixon v. Whitworth*, *supra*; nor, the expense of a refit to enable the ship to complete her voyage, S. C.

Where the insurance was on a ship and cargo, with a warranty "free from average or claim from jettison or leakage, unless consequent on stranding, sinking, or fire," and the ship, during the voyage, by bad weather, became leaky, and having put into port was unable to proceed, and the ship and goods were sold, the assured was held entitled to recover as an average loss. *Carr v. R. Exch. Assur. Co.*, 5 B. & S. 433; 33 L. J., Q. B. 63.

There is not a total loss of part, but only particular average, where some bales of insured silk were so damaged as to make it prudent to sell them, if a portion of each bale might have been saved and sent home at a moderate expense, retaining its saleable character as silk. *Navone v. Haddon*, 9 C. B. 30; 19 L. J., C. P. 161. And, where memorandum goods of the same species are shipped, whether in bulk, or in packages, not expressed by distinct valuation, or otherwise, in the policy to be separately insured, and there is no general average nor stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though one or more entire packages be entirely destroyed. *Ralli v. Janson*, 6 E. & B. 422; 25 L. J., Q. B. 310, Ex. Ch., in which case the earlier decisions were reviewed. See *Spence v. Union Marine Insur. Co.*, L. R., 3 C. P. 427; cited *ante*, p. 398. Where, however, goods essentially different in

nature and kind are insured under a general description as "masters' effects," the warranty is divisible, and means that the insurers will be liable for a total loss only of any of the specific articles insured under that description. *Duff v. Mackenzie*, 3 C. B., N. S. 16; 26 L. J., C. P. 313; *Wilkinson v. Hyde*, 3 C. B., N. S. 30; 27 L. J., C. P. 116. And, where the policy was on a ship and machinery in it, which were separately valued, and there was the clause "average payable on the whole or upon each as if separately insured," with the usual memorandum, and the ship caught fire and was damaged, but not the machinery, it was held that the expense of putting out the fire was not a particular average of the hull, but ought to be apportioned between the hull and the machinery, being an expenditure for the benefit of both equally. *Oppenheim v. Fry*, 5 B. & S. 348; 33 L. J., Q. B. 267, Ex. Ch.

A usage that underwriters are not liable, under the ordinary form of policy, to general average on account of the jettison of timber stowed on the deck, is a valid custom, and not inconsistent with the terms of such policy. *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J., Ex. 217; 7 H. & N. 954; 31 L. J., Ex. 363, Ex. Ch.

A policy on profits to be earned by a British ship made "free from average, but, without benefit of salvage," is void under 19 Geo. 2, c. 37, s. 1; *Smith v. Reynolds*, 1 H. & N. 221; 25 L. J., Ex. 337; *De Mattos v. North*, L. R., 3 Ex. 185; *Mortimer v. Broadwood*, 20 L. T., N. S. 398; E. T. 1869, C. P. So, a similar policy on commission, or profit, on ship ^{and} ships, &c., if it does not exclude British vessels. *Allkins v. Jupe*, 2 C. P. D. 375.

Damages. By 3 & 4 Will. 4, c. 42, s. 29, the jury may, if they think fit, give damages in the nature of interest, over and above, the money recoverable in all actions on policies of assurance; but, this does not apply in respect of a delay in payment, occasioned only, by there being no person entitled to give a discharge for the amount. *Webster v. British Empire Assur. Co.*, 15 Ch. D. 169, C. A.

Defence.

Under Rules, 1883, O. xix., rr. 17, 20, *ante*, pp. 283, 284, a denial of the contract operates as a denial of the making thereof in point of fact only, and not its sufficiency in point of law. Hence, an insufficient subscription of the policy by the defendant, within 30 & 31 Vict. c. 23, s. 7, *ante*, p. 248, which avoids the policy, must now be specially pleaded.

As to defences arising from want of stamp or alterations avoiding the policy under the stamp acts, *vide ante*, pp. 249, 250.

The two companies incorporated by 6 Geo. 1, c. 18, *viz.*, the London Assurance and the Royal Exchange Assurance, are empowered by 11 Geo. 1, c. 30, s. 43, to plead in a general form, and this privilege is not taken away by 5 & 6 Vict. c. 97, s. 3. *Carr v. R. Exch. Assur. Co.*, 1 B. & S. 956; 31 L. J., Q. B. 93. Nor, it would seem, is it affected by the J. Acts. See *Garnett v. Bradley*, 3 Ap. Ca. 970, *per* Ld. Blackburn, cited *ante*, p. 274. See also Rules, 1883, O. xix., r. 12, *ante*, p. 283, which, however, reserves the right to plead "not guilty by statute," only.

In an action brought under 31 & 32 Vict. c. 86, s. 1, *ante*, p. 379, by the assignee of a policy, the defendant cannot set off or counter-claim, a debt or claim accruing to him from the assured, prior to his assignment of the policy. *Pellas v. Neptune Marine Insur. Co.*, 5 C. P. D. 34, C. A.

Concealment; misrepresentation; fraud. If the assured conceal any material fact which relates to the risk insured, the policy is void; *Carter v.*

Boehm, 3 Burr. 1905. Every fact which would affect the judgment of a rational underwriter, governing himself by the principles and calculations on which underwriters do in practice act, although it does not increase or diminish the risk incurred, must be disclosed; *Ionides v. Pender*, L. R., 9 Q. B. 131; *Rivas v. Gerussi*, 6 Q. B. D. 222, C. A., cited *post*, p. 406; even, though the fact was once known to the underwriter, if it was not present to his mind, at the time of effecting the insurance; *Bates v. Hewitt*, L. R., 2 Q. B. 595. And, the assured is bound to communicate all the information he has received, though he does not know it to be true, and though it afterwards turns out to be false. *Lynch v. Hamilton*, 3 Taunt. 37. The question is whether the fact concealed would have influenced the mind of a reasonable underwriter if communicated. *Stribley v. Imperial Marine Insur. Co.*, 1 Q. B. D. 507. If a principal, effect an insurance, in ignorance of a material fact, which ought to have been communicated to him, by an agent, having charge of the subject-matter of insurance, the insurance is void. *Fitzherbert v. Mather*, 1 T. R. 12; *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511. But, where the agent without fraud neglects to communicate to the owner damage done to the vessel, this damage is excepted out of the policy. *Gladstone v. King*, 1 M. & S. 35. To prove the defence of concealment of a material fact, it lies on the defendant to prove, not only the fact, and the plaintiff's knowledge, but, also the non-communication of it to the defendant; but, slight evidence is enough, and the mere subscribing of the policy may be evidence of it, where the suppressed fact is one which would have prevented a reasonable man from subscribing; as, that the ship had been so long abroad, on her voyage, as to be a missing ship. *Elkin v. Janson*, 13 M. & W. 663. It is sufficient to communicate facts, without the opinion or conclusion founded upon those facts. *Bell v. Bell*, 2 Camp. 479. Mere rumours or news in the public papers need not be mentioned. 3 Kent, Com. 285; but see *Durrell v. Bederley*, Holt, N. P. 283. Facts which the underwriter is presumed to know need not be communicated, as that a ship, classed A 1 at Lloyd's, will be struck off the list unless re-surveyed, in the fourth year from the registration. *Gandy v. Adelaide Marine Assur. Co.*, L. R. 6 Q. B. 746. But, the peculiar danger of a new port at which the ship is insured by the policy, and, the existence of which was unknown to the underwriter, must be disclosed. *Harrower v. Hutchinson*, L. R., 5 Q. B. 584, Ex. Ch., reversing S. C., L. R., 4 Q. B. 523. As to the admissibility of the evidence of an underwriter or other witness, as to his opinion of the materiality of a fact concealed, or of whether the fact, if known, would have altered the terms of insurance, *vide ante*, pp. 165, 166.

As there must be no concealment of a material fact, so there must be no misrepresentation of any such fact. Such misrepresentation will avoid the policy, though the actual loss is unconnected with the fact misrepresented or concealed, and though there be no fraud intended by the insurer. *Seaman v. Fonerau*, 2 Str. 1183. In *Flinn v. Tobin*, M. & M. 367, Ld. Tenterden, C. J., told the jury that a verbal mis-statement of the quantity of the cargo which the ship was about to carry would not vitiate a policy on the ship unless it was fraudulent. The question, as stated by Kent (3 Com. 283), is "Whether there was, under all the circumstances, a fair representation, or, a concealment; if the misrepresentation or concealment was designed, whether it was fraudulent; and, if not designed, whether it varied materially the object of the policy, and changed the risk understood to be run. If the representation was by fraudulent design, it avoids the policy, without staying to inquire into its materiality; and if it was caused by a mistake or oversight, it does not affect the policy, unless material, and, not true in substance." So, a mis-statement as to the name or age of the ship avoids the policy. *Ionides v. Pacific Insur. Co.*, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517,

Ex. Ch. But, in the case of an open policy on goods, in ships to be afterwards declared, a mistake as to the description of the ship made in the declaration is not material. S. C. In *Anderson v. Thornton*, 8 Exch. 425, it was held that a plea alleging a material mis-statement as to the time of sailing, fraudulently made, may be supported by proof of material mis-statement, but without fraud. If the representation is not a positive assertion, but only an expression of the speaker's opinion, expectation, or belief, this will not avoid the policy, if the assertion is made *bond fide*, and in ignorance of the untruth. *Barber v. Fletcher*, 1 Doug. 305; *Bowden v. Vaughan*, 10 East, 415; *Anderson v. Pacific, &c. Insur. Co.*, 21 L. T., N. S. 408, P. C.; see *Ionides v. Pacific Insur. Co.*, *ante*, p. 405. It is sufficient, however, if a representation be substantially correct, and it need not, like a warranty, be strictly and literally complied with. *Pawson v. Watson*, Cowp. 785. See as to life policies, and the distinction between marine and life policies, *Wheelton v. Hardisty*, 8 E. & B. 232; 26 L. J., Q. B. 265; cited *post*, p. 410. In the case of insurance of chartered freight, the non-disclosure of a power in the charterer to cancel the charter-party is fatal. *Mercantile Steam SS. Co. v. Tyser*, 7 Q. B. D. 73.

The slip, though not admissible in evidence as a contract, by reason of the 30 & 31 Vict. c. 23, s. 7, is, by mercantile usage, treated as the contract for insurance, *vide ante*, p. 249. Hence, facts coming to the knowledge of the assured after the slip is signed, but, before the policy is delivered out, need not be disclosed to the underwriter. *Lishman v. N. Maritime Insur. Co.*, L. R., 8 C. P. 216; L. R., 10 C. P. 179, Ex. Ch. See also *Cory v. Patton*, L. R., 7 Q. B. 304; and L. R., 9 Q. B. 577. So, where the assured conceals from the underwriter a material fact, when the slip is signed, and the underwriter delivers out the policy in conformity with the slip after the fact has come to his knowledge, it is a question for the jury whether the underwriter elected to go on with the policy; if not, the policy does not bind him; *Morrison v. Universal Marine Insur. Co.*, L. R., 8 Ex. 197, Ex. Ch.; and where the underwriter stated, when he issued the policy, that he should rely on the concealment, it was held that he might do so; *Nicholson v. Power*, 20 L. T., N. S. 580, Ex. Ch., E. T. 1869.

In an action against a second or subsequent underwriter, it has been the practice to admit evidence of representations to the first underwriter, on a presumption that the subsequent underwriter gave credit to them. *Pawson v. Watson*, *Barber v. Fletcher*, *supra*; *Marsden v. Reid*, 3 East, 572. This rule is confined to representations made to the first underwriter, that is, the first on the policy. S. C.; *Bell v. Carstairs*, 2 Camp. 543. The principle of the rule was questioned by Ld. Ellenborough, C. J., in the last case, and in *Forrester v. Pigou*, 1 M. & S. 13.

If goods insured are over-valued with intent to defraud the underwriters, the contract is void, and, the assured cannot recover, even for the value actually on board; *Haigh v. De la Cour*, 3 Camp. 319; and, even without fraud, an excessive over-insurance may be a material fact, and, if concealed from the underwriter, the policy be void; *Ionides v. Pender*, L. R., 9 Q. B. 531. So, where there were successive open policies, on goods to be declared, and the assured, fraudulently declared the goods at risk, at an under-value, on the earlier policies, the policies effected subsequently, to such false declarations, were held void, and were ordered to be cancelled. *Rivaz v. Gerussi*, 6 Q. B. D. 222, C. A.

Illegality.] A contravention of law by the assured, having direct relation to the subject of the risk, will vitiate the policy. Thus, where a ship was loaded in contravention of the 16 & 17 Vict. c. 107, forbidding a ship to sail from certain ports at certain times in the year with any of the cargo on

deck, and the plaintiff insured the cargo with the express knowledge of the mode of loading, it was held that the plaintiff could not recover for any part of the cargo; *Cunard v. Hyde*, 2 E. & E. 1; 29 L. J., Q. B. 6; *aliter*, if the assured had no knowledge of the mode of loading; S. C., E. B. & E. 670; 27 L. J., Q. B. 408. If the master so loaded, without the knowledge of his owner, the owner may recover on an insurance of freight. *Wilson v. Rankin*, 6 B. & S. 208; 34 L. J., Q. B. 62; L. R., 1 Q. B. 162, Ex. Ch. So, the owner may recover, where the master has, without his knowledge, in contravention of the Merchant Shipping Act, 1854, s. 318, taken passengers on board without a certificate. *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581.

Payment.] It is a good defence to show a custom that credit taken between the insurance broker and underwriter should be taken as payment to the assured by the underwriter, after the amount has been adjusted between him and such broker. *Stewart v. Aberdeen*, 4 M. & W. 211. But, the assured, is not bound by such a custom, if he had no knowledge of it. *Sweeting v. Pearce*, 9 C. B., N. S. 534; 30 L. J., C. P. 109, Ex. Ch. An adjustment indorsed on the policy, produced by the assured, with the defendant's name struck out of it, is not evidence for the defendant that the amount so adjusted has been paid. *Adams v. Sanders, M. & M.* 373.

Return of Premium.

A claim for a return of premium is often added to a claim on a policy; and the question of the right to recover arises on the failure of the plaintiff to establish his case on the policy.

When plaintiff entitled to a return.] If the policy is void *ab initio*, or where there is no insurable interest, and, this proceeds through misinformation or other innocent cause; or, where an interest is less than that insured; the premium or part of it may be recovered. 3 Kent, Com. 341. Where there are two insurances at different times, together exceeding the interest insured, the excess of premium is to be recovered from the last insurers, and not the first. *Fisk v. Masterman*, 8 M. & W. 165. When several insurances are effected at the same time, and before the risk commenced, they are to be taken as one policy, and the return must be *pro rata*; *semb.* S. C.

If the risk has never commenced there must be a return; as if the ship never sailed, or, the policy is avoided by failure of warranty, without fraud. 3 Kent, Com. 341. But, if the risk has once commenced, or the policy be void for illegality, or for any fraud of the assured, there is no return. *Ib.*; *Alkins v. Jupe*, 2 C. P. D. 375, *ante*, p. 404; and see *Stone v. Marine Assur. Co. &c.*, 1 Ex. D. 81. The defendant having insured a cargo for a certain voyage, effected a re-insurance with the plaintiff on the same cargo and risk after the ship had, unknown to either party, arrived safely at her destination: it was held that the premium was payable on the re-insurance. *Bradford v. Symondsen*, 7 Q. B. D. 456, C. A. Where the policy is avoided by material misrepresentation or concealment, without fraud, the premium may be recovered, and the policy is conclusive evidence of payment of the premium. *Anderson v. Thornton*, 8 Exch. 425. Where the voyage and the risk are divisible, and part is not run, there may be a return of a proportionate part of the premium. As, where the voyage was from London to Halifax, Nova Scotia, to depart with convoy from Portsmouth, and when

the ship arrived at that place the convoy had sailed. *Stevenson v. Snow*, 3 Burr. 1237; 1 W. Bl. 318.

The defendant having paid the amount of premium into court, the plaintiff afterwards obtained a verdict on the policy for a sum less than the sum assured: the court directed that judgment should be entered only for the amount of the verdict, less the sum taken out of court. *Carr v. Montefiore*, 5 B. & S. 941; 34 L. J., Q. B. 21.

Life Insurance.

Many of the cases and authorities on marine policies apply equally to policies on lives and against fire; but, the contract of life assurance is, in consideration of a lump sum or of periodical payments, to pay a sum certain upon the death of a given life, and is not a contract of indemnity, like that of marine and fire policies. The pleadings sufficiently point out the nature of the required evidence.

Form of policy.] It does not appear ever to have been decided that an agreement for life insurance need be expressed in a policy or reduced to writing. The statute 14 Geo. 3. c. 48, s. 2, enacts that it shall not be lawful to make any policy on the life of any person or other event, without inserting in such policy the person's name interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote. The Stamp Act, 1870, s. 118 (which replaced the earlier statute, 16 & 17 Vict. c. 59, s. 6), requires every person, receiving or taking credit for any premium or consideration for any contract of insurance, to make out and execute a stamped policy of such insurance, within one calendar month from the receipt of the premium, under a penalty of 50*l.* This section was passed for the better securing the payment of the stamp duty, and rather negatives the idea that 14 Geo. 3, c. 48, s. 2, *supra*, was intended to avoid agreements for life insurance not in writing.

By the Married Women's Property Act, 1882, (45 & 46 Vict. c. 75), s. 11, "A married woman may, by virtue of the power of making contracts hereinbefore contained, effect a policy upon her own life, or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly. A policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts." The section enables the insured to appoint a trustee or new trustees of the policy by a memorandum in writing and the receipt of a trustee duly appointed, or in default of notice to the office, the receipt of the legal personal representative of the insured shall be a discharge to the office. See *Holt v. Everall*, 2 Ch. D. 266 C. A.; *In re Adam's Policy Trusts*, 23 Ch. D. 525, decided on 33 & 34 Vict. c. 93, s. 10.

As to stamp duties, *vide ante*, p. 247.

Assignment of policy.] The Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 1, enacts that "any person or corporation now being or hereafter," *vide post*, p. 409 "becoming entitled by assignment or other derivative title to a policy of life assurance, and possessing, at the time of action brought, the

right in equity to receive and the right to give an effectual discharge to the assurance company, liable under such policy, for monies thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such monies."

By sect. 3, "no assignment made after the passing of this Act" (20th August, 1867), "of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or, in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland or Ireland, and, the date on which such notice shall be received, shall regulate the priority of all claims under any assignment; and, a payment, *bond fide* made, in respect of any policy, by any assurance company, before the date on which such notice shall have been received, shall be as valid, against the assignee giving such notice, as if this Act had not been passed."

By sect. 4, assurance companies are, in policies issued after 30th of September, 1867, to specify the principal place or places of business at which notices of assignment may be given.

By sect. 6, every assurance company, to whom notice of the assignment of any policy shall have been duly given, shall deliver an acknowledgment in writing, under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company, of their receipt of such notice; and every such written acknowledgment, if signed by a person, being *de jure* or *de facto*, the manager, &c., of the assurance company whose acknowledgment it purports to be, shall be conclusive evidence, as against such assurance company, of their having duly received the notice to which such acknowledgment relates.

An agreement for assignment is not an assignment within this Act. *Spencer v. Clarke*, 9 Ch. D. 137.

The J. Act, 1873, s. 25 (6), *ante*, p. 282, contains a general provision with reference to the assignment of choses in action.

Interest.] By stat. 14 Geo. 3, c. 48, ss. 1, 2, a policy on lives or other events is unlawful and void, unless the person on whose account the insurance is made has an interest, and the name of the person interested, or for whose use or benefit, or on whose account, it is made, be inserted therein. If A., having no interest in B.'s life, causes him to effect an insurance in his own name, but at A.'s expense, and for A.'s benefit, this is a fraudulent evasion, and the policy is void under sect. 1. *Wainwright v. Bland*, 1 M. & Rob. 481; *Shilling v. Accidental Death Insur. Co.*, 2 H. & N. 42; 26 L. J., Ex. 266. See also S. C., 27 L. J., Ex. 16. Every one is presumed to have an insurable interest in his own life, and if he insures, whether for life or a limited time, his executor is not bound to show any interest beyond this. *Wainwright v. Bland*, *supra*. So, it is said, where a wife insures her husband's life. *Reed v. R. Exch. Assur. Co.*, Peake, Add. Ca. 70; and now see 45 & 46 Vict. c. 75, s. 11, *ante*, p. 408. But, where a wife was entitled to a legacy on attaining 21, and her husband insured her life in her name, to secure the amount of the legacy, which was then advanced to him, it was held that the policy was void, as it did not state that the husband was the person having the present interest therein; although the ultimate benefit might be for the wife. *Evans v. Bignold*, L. R., 4 Q. B. 622. A creditor has an insurable interest in his debtor's life. *Anderson v. Edie*, Park Ins., 8th ed. 914-15. And, in general, the interest which the insurer is required

to have in the life of the assured, under 14 Geo. 3, c. 48, s. 1, must be a pecuniary interest; and therefore, the insurance by a father in his own name on the life of his son, without any pecuniary interest in it, is void. *Halford v. Kymer*, 10 B. & C. 724. As to what is sufficient pecuniary interest, see *Hebden v. West*, *infra*. If a father, being engaged in a hazardous employment, agrees with his son, that the father will insure his life and the son pay the premiums, and that the father shall leave the sum insured to his son by will, *semble*, *per* Martin and Bramwell, BB., that the insurance would be the father's and valid. *Shilling v. Accidental Death Insur. Co.*, 2 H. & N. 42; 26 L. J., Ex. 266.

By sect. 3, a person who insures the life of another, or any other event, can recover from the insurer or insurers no greater sum than the amount or value of his interest in such life or event. The interest referred to is the interest at the time of making the policy, and this amount is recoverable whether the interest ceased or not before the death, or, has been satisfied *alimunde*. *Dalby v. India and L. Assur. Co.*, 15 C. B. 365; 24 L. J., C. P. 2; in the Ex. Ch., overruling *Godsall v. Boldero*, 9 East, 72. *Law v. L. Indisputable Policy Co.*, 1 K. & J. 223; 24 L. J., Ch. 196, is to the same effect. But, by this section, the assured can in no case recover more than this insurable interest, whether upon one policy or many; and if he has already received that amount on other policies, this is an answer to an action. *Hebden v. West*, 3 B. & S. 579; 32 L. J., Q. B. 85.

The assignee of a life policy is not within the Act, and need not show any interest other than the original one on which the policy is founded. *Ashley v. Ashley*, 3 Sim. 149.

Damages.] As to damages in the nature of interest under 3 & 4 Will. 4, c. 42, s. 29, *vide ante*, p. 404.

Defence.

The general observations made, *ante*, p. 404, with respect to defences to actions on Policies of Marine Insurance, will apply here.

Misrepresentation.] The assured usually subscribes a declaration answering facts inquired of by the insurers, and it is made a condition that if any be untruly answered the policy is to be void; in such case the policy is avoided though there be no intentional untruth; *Duckett v. Williams*, 2 Cr. & M. 348; *Macdonald v. Law, &c. Insur. Co.*, L. R., 9 Q. B. 228; and, though the mis-statement is found by the jury to be immaterial: for as the basis of the contract is the truth of the representation, its materiality is not in question, and ought not to be left to the jury. *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Cazenove v. British Equitable Assur. Co.*, 6 C. B., N. S. 437; 28 L. J., C. P. 259. See *British Equitable Assur. Co. v. Gt. W. Ry. Co.*, 17 W. R. 43, M. T., 1868, Malins, V.-C. If there is such express condition on the policy, yet material and fraudulent concealment or misrepresentation, though the inquiry and statement be oral, will also avoid it. *Wainewright v. Bland*, 1 M. & W. 32; 1 M. & Rob. 481. But, mere representations or statements, which turn out untrue, will not avoid a life policy (as in some cases they do a marine policy), unless the policy purports to be based upon their truth, or there be fraud. *Wheaton v. Hardisty*, 8 E. & B. 232; 26 L. J., Q. B. 265; 8 E. & B. 265; 27 L. J., Q. B. 241, Ex. Ch. See *Fowkes v. Manchester and London Assur. Association*, 3 B. & S. 917; 32 L. J., Q. B. 153. If there be an untrue statement without fraud, and the policies of a company are expressed to be "indisputable except in case of fraud," the company will, in equity, be estopped from relying on the mis-statement; and this may be

specially replied to the defence. *Wood v. Dwarries*, 11 Exch. 493; 25 L. J., Ex. 129. But, where the policy is issued by a company, which circulates a prospectus purporting that their policies are indisputable, a reply, relying on this fact, must be supported by proof, that the prospectus had been seen, or acted upon by the insured; and, the mere proof of the public circulation of the prospectus, before the policy was effected, is not sufficient. *Wheelton v. Hardisty*, *ante*, p. 410. The omission to state that the deceased had any occupation, in answer to questions in the proposal, any misstatement or concealment in which was to vitiate the policy, is not such an untrue statement as to vitiate the policy. *Perrins v. Marine & General Insur. Society*, 2 E. & E. 317, 324; 29 L. J., Q. B. 17, 242. But, the omission to state, that proposals for insurance were made to, and declined by, other insurance offices was held to vitiate a contract for insurance. *London Assur. v. Mansel*, 11 Ch. D. 363. The person whose life is the subject of insurance by another has been held to be so far an agent for the assured that his false answers will vitiate the policy. *Ravolins v. Desborough*, 2 M. & Rob. 328, and note, *Id.* 334. But this case turned on the form of the particular policy; and, the false and fraudulent statements of the person whose life is insured, and of the medical referee, will not vitiate the policy, as against an innocent person, who effected the insurance, there being no condition, that the untruth of the statement, contained in the proposal, should avoid the policy. *Wheelton v. Hardisty*, Ex. Ch., *supra*.

Suicide.] Clauses, avoiding a policy if the person, whose life is insured, "commits suicide," or "dies by his own hands," are construed to include all voluntary self-destruction, though not felonious; and consequently the unsoundness of the person's mind is not material. *Clift v. Schwabe*, 3 C. B. 437; *Dormay v. Borradaile*, 5 C. B. 380. Where the policy was conditioned to be valid, notwithstanding suicide, to the extent of any *bond fide* interest acquired by any person, by virtue of an equitable lien or security on it, on proof of such interest, to the satisfaction of the directors of the company: proof of the policy, being held by the trustees of the wife of the assured, by way of marriage settlement, was held to support the alleged lien. *Moore v. Woolsey*, 4 E. & B. 243; 24 L. J., Q. B. 40. Proof of the above facts was reasonable evidence for the directors, by which they were bound to be satisfied. S. C.; see also *Braunstein v. Accidental Death Insur. Co.*, *infra*. The clause is, in the absence of fraud, for the benefit of the assured. *Solicitors' & General Life Assur. Soc. v. Lamb*, 1 H. & M. 716; 33 L. J., Ch. 426. So, where the policy is mortgaged to the society, they are in the same position as if it had been mortgaged to a third party. *White v. British Empire, &c. Assur. Co.*, L. R., 7 Eq. 394. But, the assignees of the assured under a foreign bankruptcy, are not within the condition in a policy that it should be valid, notwithstanding suicide, if any third party had acquired a *bond fide* interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as a security for money. *Jackson v. Forster*, 1 E. & E. 463; 28 L. J., Q. B. 166; 1 E. & E. 470; 29 L. J., Q. B. 8, Ex. Ch.

Insurance against Personal Accidents.

In a policy of insurance effected against injury caused by accident or violence, provided the same should be caused by some outward and visible means, of which satisfactory proof should be furnished to the insurers, is meant such proof as the insurers may reasonably require, and not such as they may capriciously demand. *Braunstein v. Accidental Death Insur. Co.*, 1 B. & S. 782; 31 L. J., Q. B. 17. See *Moore v. Woolsey*, *supra*, and *Trew v. Ry. Passengers' Assur. Co.*, 6 H. & N. 839; 30 L. J., Ex. 317, Ex.

Ch. Where there was an exception in the policy, of death from certain specified diseases, or any other disease or cause within the system of the assured before or at the time or following such accidental injury; it was held that one of the specified diseases brought on, solely by the accident, was not within the exception. *Fitton v. Accidental Death Insur. Co.*, 17 C. B. N. S. 122; 34 L. J., C. P. 28. Where, however, the exception extends to secondary causes, the insurers are not liable. *Smith v. Accident Insur. Co.*, L. R., 5 Ex. 302. Where the policy excepted injury caused by natural disease or weakness, or exhaustion consequent on disease, and the assured while fording a stream was seized with an epileptic fit and fell into the stream and was drowned, this was held not to be within the exception. *Winspear v. Accident Insur. Co.*, 6 Q. B. D. 42, C. A.; see also *Laurence v. Accidental Insur. Co.*, 7 Q. B. D. 216.

Death by sunstroke is not a death from the effects of an injury by accident. *Sinclair v. Maritime Passengers' Assur. Co.*, 3 E. & E. 478; 30 L. J. Q. B. 77.

As to stamp duties, *vide ante*, p. 247.

Fire Insurance.

The fundamental principle of fire insurance is that like an open marine policy, it is a contract of indemnity. *Castellain v. Preston*, 11 Q. B. D. 380, C. A.

Policies of fire insurance are within the stat. 14 Geo. 3, c. 48, cited *ante*, pp. 408, 409. As to their form, *vide ante*, p. 408. A fire policy was not generally assignable, at law, except with the consent of the insurer. 3 Kent, Com. 375; Park Ins., 8th ed. 978; but, this is now altered by the J. Act, 1873, s. 25 (6), *ante*, p. 282. Where the policy requires particulars of loss to be delivered by the plaintiff, within a certain time of the fire, it is a condition precedent. *Mason v. Harcey*, 8 Exch. 819; 22 L. J., Ex. 336. See *Fearnley v. L. Guarantee Co.*, 5 Ap. Ca. 911, D. P. As to whom the notice of loss may be given under a similar clause see *Marsden v. City & County Assur. Co.*, L. R., 1 C. P. 232. Fire policies are sometimes so framed as to be covenants to pay only an adjusted loss; in such case before adjustment no action can be maintained on the policy. *Elliott v. R. Exchange Assur. Co.*, L. R., 2 Ex. 237. A policy from August 14th to November 14th was held to include the latter day, on which a fire took place. *Isaacs v. R. Insur. Co.*, L. R., 5 Ex. 296.

As to interim receipts for premiums which are analogous to slips in marine insurance, *vide ante*, p. 249. See *Parsons v. Queen Insur. Co.*, 7 Ap. Ca. 96, P. C.

As to stamp duties, *vide ante*, p. 247.

Interest.] *Vide ante*, p. 409. It is necessary to show an interest in the subject insured at the time of insuring and of the fire. *Lynch v. Dalzell*, 4 Bro. P. C., 2nd ed. 431; *Saddlers' Co. v. Badcock*, 2 Atk. 554. The unpaid vendor of a house may recover the full value thereof, if it be burnt before the conveyance is executed, though after the contract of sale. *Collingridge v. R. Exchange Assur. Co.*, 3 Q. B. D. 173. This interest need not be the absolute property; thus, an insolvent might insure a house, &c., to which his assignees were entitled, he being in possession and responsible to the real owners. *Marks v. Hamillon*, 7 Exch. 323; 21 L. J., Ex. 109. Warehousemen and wharfingers may insure their customer's goods in their custody, and may recover the whole value under a policy on goods "held in trust or on commission." *Waters v. Monarch Assur. Co.*, 5 E. & B. 870; 25 L. J.,

Q. B. 102. And, a carrier, who so insures, may recover the whole value of goods lost by fire, although the owner of the goods may be disabled from recovering from the carrier by reason of the value not being declared under the Carriers Act. *L. & N. W. Ry. Co. v. Glym*, 1 E. & E. 652; 28 L. J., Q. B. 188. See also *Ebsworth v. Alliance Marine Insur. Co.*, cited *ante*, p. 382. But, it is otherwise, where the further words, "for which they" (the assured) "are responsible," are added. *N. British Insur. Co. v. Moffatt*, L. R., 7 C. P. 25. As to the claim of the general owner to the insurance money, when received by the assured, see *Martineau v. Kitching*, L. R., 7 Q. B. 436, and *Ebsworth v. Alliance Marine Insur. Co.*, *supra*. Goods delivered by A. to B., who is to return to A. an equivalent quantity of similar goods, but not necessarily the identical goods delivered to B., are to be insured as the goods of B., and not as the goods held by B. in trust; for the transaction amounts to a sale of the goods to B. *S. Australian Insur. Co. v. Randell*, L. R., 3 P. C. 101.

Description of the articles insured; alteration in premises, &c.] The property intended to be insured must be described; but, substantial accuracy is sufficient. See *Forbes' claim*, L. R., 19 Eq. 485. Thus, where the policy required the house or other building, in which the goods are, to be mentioned, the goods of a lodger may be called "goods in his dwelling-house." *Friedlander v. London Assur. Co.*, 1 M. & Rob. 171. The locality of the subject of insurance is material. *Pearson v. Commercial Union Assur. Co.*, 1 Ap. Ca. 498, D. P., *ante*, p. 393. Where the premises are described as being where "no fires are kept, or hazardous goods deposited," this means where no fires are *habitually* kept; and the casual use of fire to repair the premises does not come within the condition. *Dobson v. Sotheby, M. & M.* 90. So, where the condition was against any alteration of the trade without notice, a single instance of drying bark in a kiln, used and insured, as a corn kiln will not avoid the policy. *Shaw v. Robberds*, 6 Ad. & E. 75. When no steam engine, stove, or other description of fire heat was to be introduced, without notice to the insurers, the introduction of a stove and use of it on one occasion, as an experiment, without notice, prevents the insured recovering. *Glen v. Lewis*, 8 Exch. 607; 22 L. J., Ex. 228. But, where there is no condition relating to alterations in the premises after the policy, a subsequent change, as by setting up a more hazardous trade in them, if without fraud, will not avoid the policy. *Pim v. Reid*, 6 M. & G. 1. Policies usually provide for notice of any such change; and where the alteration is one which makes the subject-matter insured no longer substantially correspond with the property as *particularly* described in the policy, and varies the risk, it will avoid the assurance; for the description in such cases is equivalent to a warranty. *Sillem v. Thornton*, 3 E. & B. 868; 23 L. J., Q. B. 362. In this last case, the house was enlarged so as no longer to agree with a description of it, annexed to the policy, and referred to in it so as to form a part of it. But, such a constructive warranty or condition is restrained by an express condition, requiring notice of any alteration increasing the risk and payment of a higher premium. *Stokes v. Coz*, 1 H. & N. 533; 26 L. J., Ex. 113, Ex. Ch.

If there be a condition in the policy that no more than 20 pounds of gunpowder be on the premises insured, the policy is avoided if the condition be broken, although the breach of the condition have not occasioned the loss. *Beacon Life Assur. Co. v. Gibb*, 1 Moo. P. C., N. S. 79.

Loss.] A fire policy is a contract of indemnity, and the assured can only recover the actual loss or damage sustained by him according to the real quantity and value of the goods at the time of the fire. *Chapman v. Pole*,

22 L. T., N. S. 306, Cockburn, C.J. ; and, in respect of the interest in the goods covered by the insurance ; *Castellain v. Preston*, 11 Q. B. D. 397, *et seq.*, per Bowen, L.J. A valued policy is considered an open one if the loss be not total, and damage and expenses caused by removing articles insured are also covered by the policy. 3 Kent, Com. 375, and note. By 28 & 29 Vict. c. 90, s. 12, "any damage occasioned by the" metropolitan "fire brigade" constituted by that act "in the due execution of their duties, shall be deemed to be damage by fire within the meaning of any policy of insurance against fire."

A damage sustained by atmospheric concussion, caused by an explosion of gunpowder at a distance, is not a damage insured against in a policy against loss occasioned by fire. *Everitt v. London Assur. Co.*, 19 C. B., N. S. 126 ; 34 L. J., C. P. 299. See *Marsden v. City and County Assur. Co.*, *infra*. Where a fire policy contained an exception of liability for loss or damage by explosion, except for such loss or damages as should arise from explosion by gas, and an inflammable vapour caught fire, exploded, and caused a further fire, it was held that gas meant only ordinary coal gas ; and that the exception included not only the effects of the explosion, but also the further fire caused thereby. *Stanley v. Western Insur. Co.*, L. R., 3 Ex. 71.

The policy covers a loss by fire owing to the negligence of the assured himself, if there be no fraud. *Shaw v. Robberds*, 6 Ad. & E. 75. Wilful misrepresentations of the value of the property destroyed will, under the usual clause against fraudulent claims, defeat and vitiate the whole claim. *Britton v. R. Insur. Co.*, 4 F. & F. 905 ; see also *Chapman v. Pole*, *ante*, p. 413.

A condition "that if, at the time of any loss happening to any property hereby insured, there be any other subsisting insurances, whether effected by the assured or any other person, covering the same property," the insurer shall not be liable to pay more than his rateable proportion of such loss, applies only where the same property is the subject-matter of insurance, and the interests are the same. *N. British and Mercantile Insur. Co. v. L. Liverpool & Globe Insur. Co.*, 5 Ch. D. 569, C. A. See further as to double insurance. *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 668, Ex. Ch.

Where A. is insured by B., and A. can also recover the loss from C., B. may, when he has made good A.'s loss, recover in A.'s name the amount over from C. *Mason v. Sainsbury*, 3 Doug. 61 ; *N. British & Mercantile Insur. Co. v. L. Liverpool, & Globe Insur. Co.*, *supra*. And, so if after B. has paid A. the amount of his loss, C., under a legal obligation, also makes it good, B. can recover the amount from A., whether A.'s right of action against C. is founded on tort. *Darrell v. Tibbitts*, 5 Q. B. D., 560 C. A. ; or, arises out of contract. *Castellain v. Preston*, 11 Q. B. D., 380 C. A. See also cases cited *ante*, p. 402.

Insurance against Accidents to Chattels.

By a policy of insurance, plate glass in the plaintiff's shop front was insured against "loss or damage originating from any cause whatsoever, except fire," &c. ; a fire broke out on premises adjoining the plaintiff's, but, did not approach his shop front ; a mob attracted by the fire tore down the plaintiff's shop shutters, and broke the plate glass for the purpose of plunder ; it was held that the proximate cause of the damage was the lawless act of the mob, and that it did not fall within the exception of the policy. *Marsden v. City and County Assur. Co.*, L. R., 1 C. P. 232.

As to stamp duties, *vide ante*, p. 247.

ACTION ON CONTRACT OF AFFREIGHTMENT.

This action lies by or against a shipowner, whether the ship be general or chartered. The contract need not be under seal. In the case of a general ship, the bill of lading, or in the case of a chartered ship, the charter-party, is the proof of the contract. As the pleadings and proofs are substantially the same, whether the contract be or be not under seal, the following cases are to be taken as applicable to actions on contracts between shipper and shipowner, whatever the technical form of action may be, unless otherwise specified.

As to the admissibility of oral evidence to explain charter-parties, bills of lading, or other like contracts, see *ante*, pp. 21, *et seq.*

A charter-party, or memorandum in the nature of one, commonly contains clauses on the part of the shipowner, for seaworthiness, the reception and delivery of the cargo, and performance of the voyage, with an exception of certain perils. On the part of the charterer or freighter, the clauses are to load in a given time, and to pay freight and demurrage. As to stamp duties thereon, *vide ante*, p. 233.

As to bills of lading, *vide infra*.

The captain or master of a ship is an agent of the owners with larger powers than an ordinary agent. As between him and third persons, he is personally liable on contracts, made in the course of his ordinary employment, in his own name, or as agent of the owner, and he is able to sue on contracts so made. So, where like contracts are made by him, whether he sign expressly as agent or not, the owner may sue or be sued on them. Hence, he may sign a charter-party or bill of lading in his own name, and thereby bind his owners. 3 Kent, Com. 161-164; Story on Agency, cap. 6, ss. 116-123. And, he may sue in his own name for freight. *Shields v. Davis*, 6 Taunt. 65. The law of the country to which the ship belongs is *prima facie* that which binds the parties to a contract of affreightment; *Lloyd v. Guibert*, L. R., 1 Q. B. 115, Ex. Ch.; *The Gaetano & Maria*, 7 P. D. 137 C. A., but this rule will be modified where the parties show a different intention. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 529, 540. See further as to the master's authority to bind his owners, *post*, p. 525.

Bill of lading] A bill of lading contains a receipt for and description of the goods received on board, the names of the shipper and consignee, the place of delivery (certain perils excepted) and the freight; and it is signed (in three parts) by the master, as agent of the shipowners. The words "or assigns" are usually added to the name of the consignee, and it is questionable whether it be transferable by indorsement, unless the words be subjoined; see *Henderson v. Comptoir d'Escompte de Paris*, L. R., 5 P. C. 253; except, perhaps, in the case of special custom in certain foreign trades; see *Renteria v. Ruding*, M. & M. 511. But, the omission of the words "or assigns" does not of itself give notice that the person in whose name the bill is made out is entitled to deal with the goods absolutely. *Henderson v. Comptoir d'Escompte de Paris*, *supra*.

Although the indorsement of a bill of lading transferred the property in the goods, at common law, it conveyed no right of action to or against the indorsee in his own name as upon the original contract. *Thompson v. Dominy*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249. And, the receipt of the goods by the indorsee was only evidence for a jury of a new contract to pay freight in consideration of the delivery, on

which he might be sued. *Kemp v. Clark*, 12 Q. B. 647. But, by the Bills of Lading Act (18 & 19 Vict. c. 111), it is enacted (sect. 1), that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to, and vested in him, all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." But (sect. 2) "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

The consignee or indorsee of a bill of lading may deprive the unpaid vendor of his right to stop the goods *in transitu* by indorsing it for valuable consideration, although the goods are not paid for, provided the indorsee for value has acted *bonâ fide* and without notice. *The Marie Joseph*, L. R., 1 P. C. 219, 227; *The Argentina*, L. R., 1 Adm. 370. A past debt is sufficient consideration. *Leask v. Scott*, 2 Q. B. D. 376, C. A.; overruling *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393. See further, *post*, *Action for conversion of goods—Defence—Stoppage in transitu—how defeated*. The indorsee has transferred to him, the same rights and liabilities in respect of the goods, as if the contract in the bill of lading had been made with him. *The Helene*, B. & L. 415. Hence, actions now lie on the original contract by or against the indorsee of the bill of lading, and the shipowner or master may sue him for freight although he received the goods under circumstances which negative any intention or undertaking to pay. It seems that a person, taking a bill of lading by indorsement after a breach, by a wrongful delivery of the goods to a stranger, can maintain an action by virtue of sect. 1. *Short v. Simpson*, L. R., 1 C. P. 248, and at 252, 255, *per* Willes, J. The first indorsee of one part of a bill of lading, drawn in a set, "one of which being accomplished the others to be void," gets the property in the goods, though he take no steps to enforce his rights. *Meyerstein v. Barber*, L. R., 4 H. L. 317. But, the master is justified in delivering the goods to the consignee, to whom they are by such a bill of lading made deliverable, on production of one part of the bill, although there has been a prior indorsement for value of another part, provided the master had no notice thereof, and the delivery was *bonâ fide*. *Glyn v. E. & W. India Dock Co.*, 7 Ap. Ca., 591 D. P. See further as to bills of lading in sets, *Sanders v. Maclean*, 11 Q. B. D., 327 C. A. The act does not seem to render any bill of lading negotiable, which would not have been so before the act. See *Henderson v. Comptoir d'Escompte de Paris*, *ante*, p. 415. The shipper A. of goods does not, by simply indorsing the bill of lading to B., and delivering it to him by way of security for an advance, "pass the property" in the goods to B., so as to make B. liable to the shipowner for freight under sect. 1. *Burdick v. Sewell*, 10 Q. B. D. 363.

See further sect. 3 (cited *post*, p. 428), as to the effect of a bill of lading.

In the ordinary course of business, the consignor of goods sends them to this country, accompanied by bills of lading and bills of exchange, which are to be accepted by the consignee of the goods as the consideration for the consignment; then, where the consignor sends those documents direct to the consignee, it is clear that he intended the consignee should have at once the disposal of the property and possession of the goods consigned, leaving it to him to return the bills of exchange accepted, not as a condition precedent to the property vesting, but simply as a matter of contract. *Shepherd v. Har-*

rison, L. R., 4 Q. B. 196, 203. But, where the consignor sends the bills of lading to an agent in this country to be by him handed over to the consignee, and accompanies them with bills of exchange, to be accepted by the consignee, that indicates a different intention, viz., that the handing over the bills of lading, and the acceptance of the bills of exchange should be concurrent parts, of one and the same transaction, and till the consignee has accepted the bills of exchange, the property in the goods does not pass to him, although he has obtained possession of the bills of lading, making the goods deliverable to the consignor, "order or assigns," and indorsed by the consignor in blank. S. C., *Id.*; L. R., 4 Q. B. 493, Ex. Ch., and L. R., 5 H. L. 116. See also *Ex pte. Banner*, 2 Ch. D. 278, C. A.; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, C. A. This intention is not inconsistent with a statement in the invoice, that the goods are shipped on account, and at the risk, of the consignee. *Shepherd v. Harrison*, L. R., 5 H. L. 116. See also *Moakes v. Nicholson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273; and *Gabarron v. Kreeft*, *Kreeft v. Thompson*, L. R., 10 Ex. 274, as to effect of shipping goods, under bill of lading; also *Anderson v. Morice*, 1 Ap. Ca. 713, D. P.; *Ogg v. Shuter* 1 C. P. D. 47, C. A. As to property in goods, passing when the bill of lading is posted, see *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 160.

It is a breach of contract if the master sail away with the cargo on board without signing bills of lading, but it does not amount to a conversion of the cargo, unless the circumstances show an intention by him, to deprive the shipper of his cargo. *Jones v. Hough*, 5 Ex. D. 115, C. A.

The right of suing upon a contract under a bill of lading follows the legal title to the goods as against the indorser. *The Freedom*, L. R., 3 P. C. 594; see also *The Figlia Maggiore*, L. R., 2 Adm. 106. So, where the consignors indorsed, and delivered a bill of lading to A., who indorsed, and delivered it to the plaintiff for value; this, was held to be evidence of such an indorsement and delivery, as to pass the property in the goods to the plaintiff, within the meaning of sect. 1; *Dracachi v. Anglo-Egyptian Navigation Co.*, L. R., 3 C. P. 190; and, if goods are shipped by the seller, to order, under circumstances which show that he intended to pass the property in the goods to the buyer, the mere fact of the seller having taken the bill of lading in his name, and its remaining unindorsed, will not prevent the property passing. *Joyce v. Swann*, 17 C. B., N. S. 84. See also *Mirabita v. Imperial Ottoman Bank*, *supra*.

An indorsee of a bill of lading, who has indorsed it over before the arrival of the vessel and delivery of the cargo, does not, under this statute, remain liable for the freight; *Smurthwaite v. Wilkins*, 11 C. B., N. S., 842; 31 L. J., C. P. 214; and where the consignee of goods, before the arrival of the ship, indorsed over the bill of lading to wharfingers thus: "deliver to W. or order, looking to them for all freight, &c., without recourse to us," and the shipowners accepted the indorsement, and delivered the goods to W.; the shipowners could not sue the consignee for freight. *Lewis v. McKee*, L. R., 2 Ex. 37. But, such acceptance of the indorsement by the shipowners, is not proved by showing that it was on the bill when it was presented to the captain, without proving that the captain, in fact, assented to it. S. C., L. R., 4 Ex. 58; Ex. Ch. The consignee, named in the bill of lading is liable thereon, unless he has indorsed it over, even though he has sold the cargo comprised therein. *Fowler v. Knoop*, 4 Q. B. D. 299, C. A.

Where goods are loaded, and the mate's receipt then given, and afterwards exchanged for the bill of lading, in the usual manner, the latter takes effect from the loading. *The Duero*, L. R., 2 Adm. 393. A bill of lading remains in force, until there has been a delivery of goods thereunder, to a person

having a right to receive them. *Meyerstein v. Barber*, L. R., 2 C. P. 661; L. R., 4 H. L. 317.

Where the bill of lading provided "average, if any, to be adjusted according to British custom," the admitted custom of average adjusters is made part of the contract, and the custom, though erroneous, is binding. *Stewart v. W. India, &c. Steamship Co.*, L. R., 8 Q. B. 88. See also cases cited, *ante*, p. 400.

The mortgagee of a ship is bound by bills of lading given by the mortgagor before the mortgagee took possession of the ship. *Keith v. Burrows*, 2 Ap. Ca. 636, D. P.

As to stamp duties on bills of lading, *vide ante*, p. 232.

Shipowner against Charterer or Merchant.

Although there is a charter-party by deed, yet if there is a subsequent agreement by parol, for the use of the ship, at a period before the charter-party attaches, but embodying its terms, this may be proved, and the demand recovered as on a simple contract. *White v. Parkin*, 12 East, 578. So, for other matters of agreement, express or implied, *extra* the contract. *Fletcher v. Gillespie*, 3 Bing. 635.

Where a charter-party contained the clause "in the event of war," &c., "this charter-party to be cancelled," it was held to be determined on war breaking out without the election of either party. *Adamson v. Newcastle, &c. Ins. Assoc.*, 4 Q. B. D. 462, *dis. Lush*, J.

Compliance with warranties or conditions.] In an action for not loading, the plaintiff must prove compliance with warranties or conditions. On the mere contract by the shipowner to carry goods, shipped on board his vessel, there is no implied condition that his vessel shall be seaworthy. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211, *post*, p. 419. By undertaking that the vessel shall be seaworthy, at the time of receiving the cargo, there is no warranty against "suspicion" of unfitness; therefore, where the master took antimony on board as ballast, so as to fill no more room than ballast, and the jury found it not injurious to a cargo of tea, it was held that the charterers, who were bound to load a "full cargo" of tea, were liable for refusing to put it on board, although this ballast might raise "suspicions" as to the ship's fitness for such a cargo. *Towse v. Henderson*, 4 Exch. 890.

The description of a ship in the charter-party may be a warranty, or condition precedent. Thus, if it is described as of the class called A 1, and it is not so, it would be an answer to an action for not loading; but, such a warranty only applies to the classification at the time of the contract. *Hurst v. Osborne*, 18 C. B. 144; 25 L. J., C. P. 209; *Trench v. Newgass*, 3 C. P. D. 163, C. A.; *Routh v. Macmillan*, 2 H. & C. 750; 33 L. J. Ex. 38. So, "now at sea; having sailed *three weeks ago*," is a condition; *Ollive v. Booker*, 1 Exch. 416; though had "or thereabouts" been added, as is wrongly stated in the marginal note in 1 Exch., the decision would probably have been otherwise. *Per curiam* in *Behn v. Burness*, *infra*. So, a description of the ship as "now in a particular port," amounts to a warranty; *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204, Ex. Ch.; and, in arriving at the true construction of the document, the court must look at the surrounding circumstances (as found by the jury) at the time the contract is made. S. C. So, a stipulation to sail, or be ready for loading, on a particular day is a condition precedent. *Glaholm v. Hays*, 2 M. & Gr. 257; *Oliver v. Fielden*, 4 Exch. 135; *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153; *Seeger v. Duthie*, 8 C. B., N. S. 45, 72; 29 L. J., C. P. 253; 30 L. J., C. P. 65. In

such case readiness to sail on a particular day is not disproved by the fact that the captain, *bond fide*, though wrongly, thinking the ship already sufficiently loaded, refused to receive additional goods on board, and the dispute, decided ultimately against the captain, caused delay in sailing until after the day. S. C. Where the charter-party is for a stipulated time, time is of the essence of the contract. *Tully v. Howling*, 2 Q. B. D. 182, C. A. Delay, caused by the excepted perils, when so great as to put an end in a commercial sense to the speculation, entered into between the shipowner and charterers, exonerates the charterer from loading; *Jackson v. Union Marine Insur. Co.*, L. R., 8 C. P. 572; L. R., 10 C. P. 125, Ex. Ch.; such delay has not, however, this effect under any other circumstances; *Hurst v. Osborne*, ante, p. 418; *Tarrabochia v. Hickie*, 1 H. & N. 183; 26 L. J., Ex. 26; *Jones v. Holm*, L. R., 2 Ex. 335; but, gives only an action for damages. *MacAndrew v. Chapple*, L. R., 1 C. P. 643, 648, per Willes, J. Where the ship was not chartered for any particular cargo, and a small loss of freight was all the loss occasioned by the delay: it was held, that the stipulation that the ship should with all convenient speed proceed to E., and there load a full cargo was not a condition precedent. S. C.

A statement of tonnage is not a warranty, or condition precedent. *Barker v. Windle*, 6 E. & B. 675; 25 L. J., Q. B. 349, Ex. Ch. See *Pust v. Dowie*, 5 B. & S. 20; 32 L. J., Q. B. 179; 5 B. & S. 33; 34 L. J., Q. B. 127, Ex. Ch. To an action by shipowner, against shipper, for contributions to general average, it is no answer that the ship was not seaworthy, unless it be shown that its unseaworthiness at the commencement of the voyage caused the loss, in which case it is a good defence, in order to avoid circuity of action. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211. If the ship be not fit to carry a reasonable cargo of the kind for which the ship was chartered, the charterer is not bound to load. *Stanton v. Richardson*, L. R., 7 C. P. 421; L. R., 9 C. P. 390, Ex. Ch.

The question as to what representation amounts to a condition precedent, or to a warranty, depends entirely on the intention of parties, as apparent on the contract itself; there is no general rule that representations in a charter-party are equivalent to warranties, or to conditions precedent. *Croockewit v. Fletcher*, ante, p. 418; see *MacAndrew v. Chapple*, supra.

Demurrage.] It is usual for the merchant to undertake to load and unload within a certain number of days, called *lay days*; with liberty to delay the ship for a longer specified period on payment of a daily sum, which, as well as the delay itself, is called *demurrage*. If the charter-party contains a fixed number of *demurrage* days, as well as *lay days*, and the ship is, by the fault of the merchant, delayed beyond them both, that is a *detention*, and is to be compensated for by damages; but, where no *demurrage* days are mentioned, all detention beyond the *lay days* is *demurrage*. *Sanguinetti v. Pacific Steam Navigation Co.*, 2 Q. B. D. 238, 251, per Brett, L. J. The days are, in the absence of contrary usage, to be taken as consecutive or "running" days; *Brown v. Johnson*, 10 M. & W. 331; but, by the custom of the port of London, the days in the clause of demurrage mean working days, which exclude Sundays and holidays at the custom house. *Cochran v. Reitberg*, 3 Esp. 121. For the purpose of a demurrage clause, a day is to be taken as of its natural length of 24 hours. *Laing v. Hollway*, 3 Q. B. D. 437, C. A. A fraction of a day counts as a day. *Commercial S. S. Co. v. Boulton*, L. R., 10 Q. B. 346. The lay days, allowed for loading or discharge, begin to run when the vessel arrives at the usual place of loading, or discharge, and not at the port merely. *Brereton v. Chapman*, 7 Bing. 559; *Bastifell v. Lloyd*, 1 H. & C. 388; 31 L. J., Ex. 413; *Nelson v. Dahl*, post, p. 421. Where the place of discharge is a dock, the days run from the

time the ship enters the dock, and not from when she reaches her berth for loading or discharge; *Brown v. Johnson*, ante, p. 419; *Davies v. McVeagh*, 4 Ex. D. 265, C. A.; see however *Murphy v. Coffin*, 12 Q. B. D. 87, *contra*. When the ship has reached her place of discharge, the days continue to run, even though excepted perils cause delay in unloading; *This v. Byers*, 1 Q. B. D. 244. Where goods are shipped under a bill of lading, which allows 3 "days to discharge the whole cargo, or 30*l.* per day demurrage," the days run, although the consignee cannot take his goods away, owing to the default of the consignees of other goods in not removing their goods. *Straker v. Kidd*, and *Porteus v. Watney*, 3 Q. B. D. 223; *Id.*, 534, C. A. As to damages for detention, see *Jones v. Adamson*, 1 Ex. D. 60. The lay days allowed for loading and for unloading are usually to be kept distinct. See *Marshall v. Bolckow*, 6 Q. B. D. 231.

When the charter-party is silent as to the time of loading, reasonable time under ordinary circumstances is implied, and a strike in the collieries, whence the freighter was to get his cargo, is no excuse for delay. *Adams v. R. Mail Co.*, 5 C. B., N. S. 492; 28 L. J., C. P. 33. So, where a cargo was to be loaded with "usual dispatch," this was held to mean usual dispatch, of persons who have a cargo in readiness, for the purpose of loading, and did not excuse a merchant, who had been prevented, by frost, from bringing his cargo to the place of loading. *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; see also *Fenwick v. Schmalz*, L. R., 3 C. P. 313. With regard to unloading, both the shipowner and merchant are bound to use reasonable diligence, with regard to all the circumstances. *Ford v. Cotesworth*, L. R., 4 Q. B. 127; L. R., 5 Q. B. 544, Ex. Ch. And, neither party can sue the other, for delay arising from a cause over which the latter had no control. S. C.; *Cunningham v. Dunn*, 3 C. P. D. 443, C. A. The question as to whether the defendant has loaded or unloaded within a reasonable time where the contract is "to be ready to load or unload in regular turns" is to be governed by the usage of the port as to the turns or order of loading or unloading. *Leidemann v. Schultz*, 14 C. B. 38; 23 L. J., C. P. 17; see *Shadforth v. Cory*, 32 L. J., Q. B. 379, Ex. Ch.; *Bastifell v. Lloyd*, ante, p. 419; *Lawson v. Burness*, 1 H. & C. 396; *Cawthorn v. Trickett*, 15 C. B., N. S. 754; 33 L. J., C. P. 182; *Tapscott v. Balfour*, L. R., 8 C. P. 46; *Ashcroft v. Crow Orchard Colliery Co.*, L. R., 9 Q. B. 540; and *Postlethwaite v. Freeland*, 5 Ap. Ca. 599, D. P., where the earlier cases are collected and reviewed. See also ante, p. 21, *et seq.* Where there is no usage of the port, the charterer must discharge the cargo in a reasonable time. *Fowler v. Knoop*, 4 Q. B. D. 299, C. A. When the charter-party is entered into by the shipowner with full knowledge of all the circumstances under which the cargo is to be obtained and loaded, delay in getting the cargo may be an excuse. *Harris v. Dreesman*, 9 Exch. 485; 23 L. J., Ex. 210. So, where the charter-party provided that "detention by ice should not be reckoned as laying days," it was held that this must be construed with reference to the particular nature of the place of export, S., and, as there were no warehouses there, and the cargo had to be brought down to S. in boats for loading, a detention of these boats by ice was within the exception of the charter-party. *Hudson v. Ede*, L. R., 2 Q. B. 566; L. R., 3 Q. B. 412, Ex. Ch. But, the exception does not in general apply to delay caused by ice before the cargo has reached the limits of the place of loading. *Kay v. Field*, 10 Q. B. D. 241, C. A.; *Coverdale v. Grant*, 11 Q. B. D. 543, C. A.

The defendant, an English subject, chartered the plaintiff's ship to take on board a cargo at Odessa, a port of Russia, 45 running days being allowed for loading and unloading. When there, the defendant's agent told the master that there was no cargo for him and urged him to sail; the master refused; and continued to demand a cargo until, the running days not having

expired, war was declared between England and Russia: held, that no action would lie against the defendant, as the refusal by his agent, not having been accepted by the master as a renunciation of the contract, there had been no breach of contract by the defendant, when the war put an end to it. *Avery v. Bowden*, 5 E. & B. 714; 25 L. J., Q. B. 49; 6 E. & B. 962; 26 L. J., Q. B. 3, Ex. Ch.; *Reid v. Hoskins*, 5 E. & B. 729; 25 L. J., Q. B. 55; 6 E. & B. 953; 26 L. J., Q. B. 5, Ex. Ch.

Where the charter makes "the charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage," the charterer is discharged from liability incurred for demurrage during the loading; *Francesco v. Massey*, L. R., 8 Ex. 101; *Kish v. Cory*, L. R., 10 Q. B. 553, Ex. Ch.; *Sanguinetti v. Pacific Steam Navigation Co.*, 2 Q. B. D. 238, C. A.; and the term demurrage will include damages for detention, not strictly demurrage. S. C. cited *ante*, p. 419. The clause extends to all liability under the charter arising after the ship is loaded. *French v. Gerber*, 1 C. P. D. 737; 2 C. P. D. 247, C. A. See further on modifications of the clause, *Lister v. Van Haansbergen*, 1 Q. B. D. 269, and *Lockhart v. Falk*, L. R., 10 Ex. 132. As to when demurrage is chargeable on goods delivered under a bill of lading, on the ground that the bill of lading incorporates the provisions of the charter-party, *vide post*, p. 428.

Freight and damages.] Freight is regulated by the contract, or, if none, by usage, or a *quantum meruit*, or by the course of former dealing between the parties. As a general rule, no freight is due until the goods be carried to the destined port. See *Duthie v. Hilton*, L. R., 4 C. P. 138, cited *post*, p. 425. Where charter-party freight is payable on unloading and right delivery of the cargo, the freight is not earned, until the unloading and delivery of the whole cargo has been completed. *Brown v. Tanner*, L. R., 3 Ch. 597. The delivery and payment are concurrent acts. *Paynter v. James*, L. R., 2 C. P. 348; W. N. 1868, p. 141, Ex. Ch.

Where a ship is to proceed to certain "docks or as near thereto as she may safely get," it is not sufficient for her to go to the dock gates only; *Nelson v. Dahl*, 6 Ap. Ca. 38, D. P.; if she cannot enter on arrival there, by reason of the docks being full, her obligation to wait to enter depends on the question of fact, whether, under all the circumstances, it is reasonable that she should so wait; if it be not reasonable, the charterer must take delivery as near to the dock as the ship can safely get. S. C. See on the construction of the words in a charter-party "as near thereto as she may safely get," the judgment of Ld. Blackburn in S. C., *Id.* pp. 50, 51, and cases there cited. Where a ship is to go to a safe port, or so near thereto as she may safely get, and "always lie and discharge afloat," the master is not bound to discharge at a port where she could not so lie without being lightened. *The Alhambra*, 6 P. D. 68, C. A. Where the ship is to unload at S., or "so near thereto as she may safely get at all times of the tide and always afloat," and pay demurrage for delay, and she cannot, on account of the tide, reach S. until 4 days after she had arrived at K. R., the nearest point where she could float; it was held that demurrage was payable from the arrival at K. R. *Horsley v. Price*, 11 Q. B. D. 244. Where by the charter-party a ship was to proceed with a cargo to a port, "to discharge in a dock as ordered on arriving if sufficient water, or so near thereunto as she may safely get always afloat," it was held she was only bound to discharge in a dock named if there was sufficient water when the order was given. *Allen v. Collart*, *Id.* 783.

Where the shipowner carries the cargo to the port of destination, but from the nature of the cargo, is unable to land it there, the freight becomes payable; and, if the prudent course for the master to adopt is to bring the cargo

home again, he is entitled to be paid back-freight as well as the expenses incurred in endeavouring to land the cargo. *Cargo ex Argos*, L. R., 5 P. C. 134, 155. So, freight is payable where the cargo is delivered at a port included in a charter-party, but not at the port named by the charterer, that port having become dangerous for the ship, a foreign one, by reason of war having broken out. *The Teutonia*, L. R., 4 P. C. 171.

The freight is sometimes made wholly or partly payable at the port of loading. If part of it is made payable on the "final sailing" of the ship from the port of loading, it is not payable if the ship is wrecked in an artificial canal within the limits of the port on its way out to sea, with the clearances on board, and all ready for sailing; *Roelandts v. Harrison*, 9 Exch. 444; 23 L. J., Ex. 169; and, where the ship has got out of port and cast anchor some miles off, but was not in a condition to proceed on her voyage, the shipowner was held not entitled to freight payable "on sailing." *Thompson v. Gillespie*, 5 E. & B. 209; 24 L. J., Q. B. 340. But, it is otherwise where the ship has gone some miles to sea in a state ready for the voyage, although not beyond the fixed limits of the port; and it is immaterial that she has been driven back by stress of weather into the port in its commercial sense. *Price v. Livingstone*, 9 Q. B. D. 679, C. A. See further, *ante*, p. 383. Payments made in advance, on account of freight, cannot be recovered back, though the ship be lost. *Anon.*, 2 Show. 283; *Byrne v. Schiller*, L. R., 6 Ex. 20; *Id.* 319, Ex. Ch.; *Allison v. Bristol Marine Insur. Co.*, 1 Ap. Ca. 209, D. P. Where the freighter has contracted to pay a minimum freight, or the highest that the shipowner could "prove to have been paid" for ships on the same voyage, the plaintiff, who claims a higher freight, must prove by evidence that such higher freight was actually paid, or contracted to be paid, on a voyage between the two places; and proof of the highest current freight is not enough. *Gether v. Capper*, 15 C. B. 696; 24 L. J., C. P. 69.

Where the merchant agreed to find a full return cargo of various articles, each to pay a stipulated freight from the port, but he finds none, or articles not enumerated, the measure of damage is the average freight of all the articles. *Thomas v. Clarke*, 2 Stark. 450; *Capper v. Forster*, 3 N. C. 938. When the owner stipulates for a full cargo, he is entitled to full freight, as if a full cargo had been put on board, irrespective of the tonnage of the ship mentioned in the charter. *Hunter v. Fry*, 2 B. & A. 421. *Aliter*, when the amount of cargo is mentioned. *Morris v. Levison*, 1 C. P. D. 155. Where the charter-party stipulated for a "full and complete cargo of sugar and other lawful produce," rates were mentioned for timber and other goods, and the charter-party proceeded, "other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary;" a full cargo of mahogany logs was shipped; it was held that the shipper was bound to supply broken stowage to fill up the interstices. *Cole v. Meek*, 15 C. B., N. S. 795; 33 L. J., C. P. 183. Where the contract stipulated for a full cargo of wool, tallow, bark, hides, and other legal merchandise, fixing the freight and quantity of each, except of wool and "other merchandise," it was held, that the merchant might load entirely with "other" legal merchandise, but, must pay freight as if the cargo had consisted of the stipulated quantity of tallow, bark, and hides, and the residue of wool. *Cockburn v. Alexander*, 6 C. B. 791. In this case, the court considered the words "other merchandise" as applying to goods producing the amount of freight, contemplated by the contract, and that the difference was the measure of damage. *Warren v. Peabody*, 8 C. B. 800, was decided on the same principle. But, where the charterer undertook to load "a full and complete cargo of oats or other lawful merchandise," to be delivered by the shipowner on payment of freight

as follows: "4s. 6d. sterling per 320 lbs. weight delivered for oats, and if other cargo be shipped in full and fair proportion thereto according to London Baltic printed rates," it was held that the charterer fulfilled his contract by loading a full cargo of flax, tow, and codilla, three of the articles mentioned in the Baltic printed rates, and was not liable for additional freight, as on a full cargo of oats, although this obliged the shipowner to carry 120 tons ballast to 168 tons of cargo. *Southampton Steam Colliery Co. v. Clarke*, L. R., 4 Ex. 73; L. R., 6 Ex. 53, Ex. Ch.; following on this point, *Moorson v. Page*, 4 Camp. 103.

Freight is to be calculated and paid on that amount only, which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant. *Gibson v. Sturge*, 10 Exch. 639; 24 L. J., Ex. 121, *per* Alderson, B., approved in *Buckle v. Knoop*, L. R., 2 Ex. 333, 334, Ex. Ch. In an action for freight, against the indorsee of a bill of lading, the shipowner is not, by 18 & 19 Vict. c. 111, s. 3, *post*, p. 428, estopped by an innocent misstatement of quantity in the bill, if, all that was shipped is actually delivered. *Blanchet v. Powell's Llantwit Colliery Co.*, L. R., 9 Ex. 74. As to the freight payable where the weight or bulk of the goods when delivered differs from that when shipped, see S. C.C.; *Coulthurst v. Sweet*, L. R., 1 C. P. 649; *Tully v. Terry*, L. R., 8 C. P. 679. Lump freight is a sum payable for the use of the ship, and is payable though part of the cargo is lost by the excepted perils. *Robinson v. Knights*, L. R., 8 C. P. 465; *Merchant Shipping Co. v. Armitage*, L. R., 9 Q. B. 99, Ex. Ch. See also *Blanchet v. Powell's Llantwit Colliery Co.*, *supra*.

The charterer has no right to fill the cabins as well as the carrying part of the ship, and if permitted by the master to do so, he is liable to pay the current freight for it, and cannot insist on paying only the charter price. *Mitcheson v. Nicol*, 7 Exch. 929; 21 L. J., Ex. 323.

If goods of the consignor, and carried at his risk, be delivered to the consignee, and he do not pay the freight, the consignor is liable, even though the bill of lading express that the goods are to be delivered to the consignees "paying freight for the same," this clause being inserted merely for the benefit of the shipowner. *Domett v. Beckford*, 5 B. & Ad. 521. This right to claim freight from the shipper is expressly reserved by the Bills of Lading Act (18 & 19 Vict. c. 111), s. 2, *ante*, p. 416. The circumstances may, however, rebut the inference of freight being payable, arising merely from the goods having been carried in the plaintiff's ship under bills of lading signed by the master. *Smidt v. Tiden*, L. R., 9 Q. B. 446. Though freight may not be payable in respect of goods shipped by A. in his own ship, yet if by the bills of lading he make the goods deliverable to the order of B., who has advanced him money on the security of the goods, freight becomes payable to C., to whom A. assigned the freight, to be earned by the ship. *Weguelin v. Cellier*, L. R., 6 H. L. 286. As to right of mortgagee, abandonee, or other transferee of the ship to freight, see *Keith v. Burrows*, 2 Ap. Ca. 636, D. P.

The measure of damages for not loading any cargo is the amount of freight which would have been carried, deducting expenses and any profit earned during the time covered by the charter; but *semb.*, the shipowner is not bound to take on board another cargo in order to reduce the damage. *Smith v. M'Guire*, 3 H. & N. 554; 27 L. J., Ex. 465; *Morris v. Levison*, 1 C. P. D. 155, 158. The shipowner cannot sue the merchant for not loading, when the loading was prevented by want of notice to him, that the ship was ready to receive the cargo. *Stanton v. Austin*, L. R., 7 C. P. 651.

Freight pro ratâ.] If the shipper accept part of the goods, though carried under an entire contract for freight, *Mitchell v. Darthez*, 2 N. C. 555; or,

accept the goods before the completion of the voyage, *Vlierboom v. Chapman*, 13 M. & W. 238; *The Soblomsten*, L. R., 1 Adm. 293; a new contract to pay *pro rata* may be inferred. But, as a general rule, unless the goods be carried to the destined port, no freight is due. S. C.; *Metcalf v. Britannia Iron Works Co.*, 1 Q. B. D. 613; 2 Q. B. D. 423, C. A. Thus, if the master justifiably sell part at an intermediate port, he is not entitled to recover freight, *pro rata*, for the goods sold. *Hopper v. Burness*, 1 C. P. D. 137; *Hill v. Wilson*, 4 C. P. D. 329. *A fortiori*, if the master sell the goods unjustifiably. *Acatos v. Burns*, 3 Ex. D. 282, C. A. If the master is disabled from carrying the goods further, he may tranship them, and, upon safe delivery at their destination, he is entitled to the whole freight as on the old contract, without reference to the contract with the new ship. *Shipton v. Thornton*, 9 Ad. & E. 314. The master has a reasonable time for reshipment, and if he be prevented by default of the owner of the cargo from forwarding the cargo from an intermediate port to its destination, the whole freight is payable. *Cleary v. M'Andrew*, 2 Moo. P. C., N. S. 216; *The Soblomsten*, *supra*. The master, while afloat, or in a foreign port where there is no agent of the shipper, becomes *ex necessitate*, his agent as to the goods, as well of the shipowner, as to the ship and freight; and he must do what in the exercise of a sound discretion is best for both parties; and in such a case, and not otherwise, the shipper is bound by his acts, so as to be liable for freight on a contract made by the master. *Matthews v. Gibbs*, 3 E. & E. 282; 30 L. J., Q. B. 55.

Lien for freight, &c.] In addition to his remedy by action, the shipowner has a lien on the goods for freight; and where the charterer puts goods of his own on board under a bill of lading, there is a lien on the goods, for the chartered freight, and this lien holds good against any one taking the bill of lading with knowledge of the terms of the charter-party. *Kern v. Deslandes*, 10 C. B., N. S. 205; 30 L. J., C. P. 297. The terms of the bill of lading may, however, be such as to waive the lien for the freight, in whole or part, as when it is payable at the port of lading, or by the shipper at a given time after sailing, ship lost or not lost. *Kirchner v. Venus*, 12 Moo. P. C. 361; following *Hov v. Kirchner*, 11 Moo. P. C. 21, and in effect overruling *Gilkison v. Middleton*, 2 C. B., N. S. 134; 26 L. J., C. P. 209, and *Neish v. Graham*, 8 E. & B. 505; 27 L. J., Q. B. 15; *accord. Tamvaco v. Simpson*, L. R., 1 C. P. 363, Ex. Ch. As to lien for demurrage, *vide post*, p. 428.

Where goods, upon which the master of a ship has a lien, are deposited in the king's warehouse in pursuance of the requisition of an act of parliament, the lien is not thereby waived. *Per* Ld. Kenyon, C. J., *Ward v. Felton*, 1 East, 512; *Wilson v. Kymer*, 1 M. & S. 157. So, where the consignee refuses to take the goods, the master may, it seems, place them in a warehouse under the exclusive control of himself, or the shipowner, without losing his lien. *Mors-le-Blanch v. Wilson*, L. R., 8 C. P. 227. Under the provisions of many local and personal acts, general wharves, called "sufferance wharfs," were appointed, where goods might be landed and stowed, the shipowner retaining the right of lien for freight; and now, generally, by the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), ss. 67, *et seq.*, certain powers are given to shipowners to land and enter goods from foreign ports, in default of the owner, and to retain the lien for freight, by giving notice to the owner of the wharf, &c. See hereon *Berresford v. Montgomerie*, 17 C. B., N. S. 379; 34 L. J., C. P. 41; *Wilson v. London, Italian, and Adriatic S. Navigation Co.*, L. R., 1 C. P. 61; *Meyerstein v. Barber*, L. R., 4 H. L. 328, 330; *The Energie*, L. R., 6 P. C. 306; *Glyn v. E. & W. India Dock Co.*, 7 Ap. Ca. 591, D. P.

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A shipowner has no lien on goods shipped, for unliquidated damages, by reason of the charterer failing to load a full cargo. *Phillips v. Rodie*, 15 East, 547; *Gray v. Carr*, L. R., 6 Q. B. 522, Ex. Ch. Where, however, the rate of freight and ship's tonnage has been agreed to, the claim is then a liquidated one, for which the shipowner has a lien. *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; better, L. R., 6 Q. B. 558, n. The shipowner's claim in these cases is known as "dead freight," a term, however, properly applicable only where the claim is liquidated.

Implied contracts on part of charterer or shipper.] Where by a charter-party a ship is to proceed to "a safe port," to be named by charterers, they are not entitled to name a port, safe by nature, but closed by the local government, so that a vessel entering it, without a permit, would be liable to confiscation; and, having named such a port, they are liable for a breach of the contract implied on their part to name a safe port, within a reasonable time. *Ogden v. Graham*, 1 B. & S. 773; 31 L. J., Q. B. 26. See also *The Teutonia*, L. R., 4 P. C. 171, ante, p. 422. The damages recoverable for refusing to name a wharf, are the freight that would have become payable on the delivery of the cargo. *Stewart v. Rogerson*, L. R., 6 C. P. 424.

There is an implied contract on the part of shippers, not to put on board, without notice, packages of a dangerous or corrosive matter, the nature of which, the shipowner or his agents could not be reasonably expected to know. *Brass v. Maitland*, 6 E. & B. 470; 26 L. J., Q. B. 49. But where the shipowner has an opportunity of examining the goods, there is no warranty by their owner that they are fit to be carried. *Acatos v. Burns*, 3 Ex. D. 282, C. A.

Defence.] A charterer whose cargo has been damaged, by the fault of the master, so as to be worth less than the freight, cannot discharge himself from liability to freight by abandoning the cargo to the shipowner. *Dakin v. Ozley*, 15 C. B., N. S. 646; 33 L. J., C. P. 115. Nor, can the assignee of a bill of lading deduct from the freight, the value of goods which, though mentioned in the bill of lading signed by the plaintiff, were not put on board. *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289; see post, pp. 428, 429. But, the cross claim may now be set up by way of set-off or counter-claim under Rules, 1883, O. xix., r. 3. And, where the bill of lading provided that the freight should be paid within three days after arrival of ship, and before delivery of any portion of the goods, and after the goods had arrived, and before the expiration of the three days, the goods were accidentally destroyed, so that they did not exist any longer in specie, it was held that no freight was recoverable. *Duthie v. Hilton*, L. R., 4 C. P. 138.

Where the shipowner finally abandons the ship during the voyage, the owner of cargo may treat the contract of affreightment as at an end, and resume possession of his cargo without payment of freight. *The Cito*, 7 P. D. 5, C. A.

Merchant against Shipowner or Master.

The master, as well as the owner of a general ship, is liable as a common carrier of goods. *Morse v. Slue*, 2 Lev. 69; 1 Vent. 238; *Liver Alkali Co. v. Johnson*, L. R., 7 Ex. 267; L. R., 9 Ex. 338, Ex. Ch.; Story on Agency, s. 315. His liability is limited by the same common law exceptions as in the case of land carriers, and by such further exceptions as may be expressed in the charter-party or bill of lading, or sanctioned by act of parliament. See further, *Action against carriers*, post, p. 561, et seq. As to the liability of a shipowner, for damage caused to cargo, by collision with another of his ships, see *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.*, 10 Q. B. D. 521, C. A.

Where a stevedore, or special agent, is appointed by the charterer to load and stow a ship, which he puts up as a general ship, the master is exempt from liability for bad stowage, unless done under his particular orders; *Blaukie v. Stembridge*, 6 C. B., N. S. 894; 28 L. J., C. P. 329; 6 C. B., N. S. 911; 29 L. J., C. P. 212, Ex. Ch.; or, unless the charter-party provides that the charterers are not in any case to be responsible for improper stowage. *Sack v. Ford*, 13 C. B., N. S. 90; 32 L. J., C. P. 12. But, an unexercised option, given to the charterer, of appointing a stevedore, does not dispense with the master's ordinary duty to load the ship properly. *Anglo-African Co. v. Lamzed*, L. R., 1 C. P. 226. See further as to liability of shipowner to charterer for negligence of master and crew, *Omoa, &c. Coal & Iron Co. v. Huntley*, 2 C. P. D. 464. Where the plaintiff's goods have been injured by being stowed in contact with a deleterious substance, he may sue the person who so stowed them, although there is no contract between them. *Hayn v. Culliford*, 4 C. P. D. 182, C. A.

Exception of Perils.] In considering whether a loss falls within the exception in a bill of lading or charter-party, regard is to be had to the *causa causans*, rather than to the *causa proxima*. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 531, 543, *per Brett and Lindley*, L. J. J. Thus, where goods are shipped under a bill of lading which contains an exception from liability for "accidents or damage of the seas," a loss through a collision, occasioned by the negligence of the crew, is not within the exception. *Grill v. General Iron Screw Colliery Co.*, L. R., 3 C. P. 476, Ex. Ch. So, an exception of "perils of the sea" does not protect against damage, where the collision was caused by the negligence of either of the colliding vessels. *Woodley v. Mitchell*, 11 Q. B. D. 47, C. A. So, an exception of dangers of the seas and fire does not include barratry. *The Chasca*, L. R., 4 Adm. 446. So, an exception for "breakage, leakage, or damage," does not protect the shipowners from liability for damage accruing through the negligence of their servants. *Czech v. General Steam Navigation Co.*, L. R., 3 C. P. 14; *Leuro v. Dudgeon*, *Id.* 17, n.; see also *Notara v. Henderson*, L. R., 7 Q. B. 225, 236, Ex. Ch.; and *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R., 3 Ex. 9, cited *post*, p. 563. But, such exceptions shift the onus of proof, and oblige the plaintiff to prove, affirmatively, the negligence of the defendant's servants. *The Helene*, B. & L. 429; 35 L. J., P. C. 63. So, in an action for loss of cargo, alleged to have been jettisoned and sold in consequence of the ship's stranding, the plaintiff must prove that the stranding was occasioned by the negligent navigation of the ship. *The Norway*, B. & L. 404. See, however, *Taylor v. Liverpool & Gt. W. Steam Co.*, L. R., 9 Q. B. 546. An exception against leakage does not include injury done to other goods by such leakage. *Thrift v. Youle*, 2 C. P. D. 432. An exception of damage caused by navigation does not include damage caused by improper stowage. *Hayn v. Culliford*, 3 C. P. D. 410; 4 C. P. D. 182, C. A. A condition "no claim whatever for damage will be admitted, unless made before goods are removed" covers all damage, whether apparent or latent, which could have been discovered at the place of removal by examination with reasonable care and skill. *Moore v. Harris*, 1 Ap. Ca. 318, P. C. Damage caused to the goods by unseaworthiness of the ship, which existed when she started on her voyage, is not within the exception in the bill of lading. *Steel v. State Line S. Ship Co.*, 3 Ap. Ca. 72, D. P. See also *Tattersall v. National S. Ship Co.*, W. N. 1884, p. 70, Q. B. D. An exception of "any damage to any goods, which is capable of being covered by insurance," does not extend to a general average loss sustained by the goods. *Crooks v. Allan*, 5 Q. B. D. 38. See further as to the losses which fall within the perils usually excepted, *Marine Insurance—Proof of loss*, *ante*, p. 390, *et seq.*

Statutory exemptions from, or limitation of liability.] The various acts for limiting the liability of shipowners are repealed and replaced by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). In Part 9 of this Act, s. 503, it is provided that no owner of any sea-going ship, or share therein, shall be liable to make good, any loss or damage that may happen, without his actual fault or privity, (1), of or to goods or things taken on board, by reason of fire happening on board, or (2), of or to any gold, silver, diamonds, watches, jewels, or precious stones on board, by reason of robbery or embezzlement, unless the shipper has, at the time of shipping the same, inserted in his bill of lading, or otherwise declared in writing to the master or shipowner, the true nature and value thereof. The 25 & 26 Vict. c. 63 (after repealing by s. 2 and Sched. A. ss. 504 and 505 of the Act of 1854), enacts (sect. 54) that the owners of any ship, whether British or foreign, shall not, in cases which occur without their actual fault or privity, be answerable in damages in respect of loss or damage to any goods, merchandise, or other things on board, to an amount exceeding 8*l.* for each ton of the ship's tonnage—registered tonnage in case of sailing ships, and in case of steam ships gross tonnage. The section contains provisions for ascertaining a foreign ship's tonnage. The defendant is also liable to pay interest on the amount from the date of collision. *Smith v. Kirby*, 1 Q. B. D. 131. The section seems to extend to damage caused by delay in delivering goods: see *Millen v. Brasch*, 10 Q. B. D. 142, C. A. *post*, p. 569. Though it has been held to be otherwise in the case of passengers; *L. & S. W. Ry. Co. v. James*, L. R., 8 Ch. 241; see however *Millen v. Brasch*, *supra*. By sect. 516 of the Act of 1854, nothing shall be construed to lessen the liability of any master or seaman, being also owner or part-owner of the ship, to which he is subject as such master or seaman; and by sect. 506, the owner is liable for every loss or damage arising on distinct occasions as if no other loss had arisen. See *The Rajah*, L. R., 3 Adm. 539. By sect. 502, the above provisions apply to the whole of the Queen's dominions. By sect. 388, neither owner nor master is liable for loss or damage occasioned by the fault or incapacity of a qualified pilot, where the employment of one is compulsory. On the construction of this section, and as to when the employment of a pilot is compulsory, *vide post*, *Negligent navigation of ships*.

The master is not expressly protected in the above provisions, except in relation to loss by employment of a pilot; and this exception seems to be designed. The previous acts included him in some cases, and omitted him in others. On one of the previous acts (26 Geo. 3, c. 86) it was decided that a loss by a fire on board a public lighter, employed by the shipowner to convey the goods on board, was not within the protection of the act, which was in similar terms to the present act. *Morewood v. Pollok*, 1 E. & B. 743; 22 L. J., Q. B. 250.

Implied contracts on part of shipowner or master.] The master impliedly contracts that his vessel shall be fit for the purpose of carrying the goods; *Lyon v. Mells*, 5 East, 428; *Richardson v. Stanton*, L. R., 7 C. P. 421; L. R., 9 C. P. 390, Ex. Ch.; 45 L. J., C. P. 78, D. P.; she must, therefore, be seaworthy when she starts on her voyage. *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Cohn v. Davidson*, 2 Q. B. D. 455; *Steel v. State Line S. Ship Co.*, 3 Ap. Ca. 72, D. P. Where there is no stipulation as to time, the master must sail in a reasonable time, and proceed, without deviation, to the destined port, otherwise he will be liable for any loss to the plaintiff occasioned by the delay; or, to any loss, whether by perils of the sea, or otherwise, occurring during the deviation; 3 Kent, Com. 209, 210; unless the defendant can prove that

the loss must have happened had there been no deviation. *Davis v. Garrett*, 6 Bing. 716; *Scaramanga v. Stamp*, 4 C. P. D. 316; deviation is justifiable to save life, but not merely to save property. *S. C. Id.*, and 5 C. P. D. 295, C. A. See further as to deviation, *ante*, p. 388. A well-founded fear of capture may justify a master in not leaving a port in performance of his contract; *Pole v. Celcorich*, 9 C. B., N. S. 430; 30 L. J., C. P. 102; even though the ship alone would be in danger of capture. *The Teutonia*, L. R., 4 P. C. 171; *The San Roman*, L. R., 5 P. C. 301. A statement in a charter-party that the ship is "expected to arrive" at a port A. by a given day, is a warranty, that she is then, in such a position, that she may reasonably be expected to arrive there by that day. *Corkling v. Massey*, L. R., 8 C. P. 395.

Upon arrival at the port, the master is bound to deliver to the consignee or order of the shipper, on production of the bill of lading, and payment of freight (and other lawful charges) for which the master has a lien on the goods, unless it appears on the bill of lading that freight has been paid, in which case it is an estoppel as against the master or owner. 3 Kent, Com. 214; *Howard v. Tucker*, 1 B. & Ad. 712. Where there is a charter-party the provisions of which are binding only as between the shipowner and the charterer, and there is a bill of lading given by the master which gets into the hands of a *bond fide* assignee for value, he is entitled to have the goods delivered to him upon his fulfilling the terms mentioned in such bill of lading, and is not ordinarily bound to refer to the charter-party. *Chappel v. Comfort*, 10 C. B., N. S. 802; 31 L. J., C. P. 58, *per* Willes, J. A bill of lading in the form "on being paid for freight the sum of £— (according to charter-party)," with the memorandum "there are 8 working days for unloading in London," implies no contract, on the part of the indorsee, for value, of the bill, to pay demurrage. *S. C.* So, where the form was "he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods, as *per* the aforesaid charter-party," the consignee named in the bill of lading was held liable only for demurrage, at the port of loading, during the 10 days at which the ship might under the charter be kept on demurrage at 8*l.* a day, and not for damages for further delay in loading, nor for dead freight. *Gray v. Carr*, L. R., 6 Q. B. 522. See also *The Norway*, B. & L. 226; *Russell v. Niemann*, 17 C. B., N. S. 163; 34 L. J., C. P. 10; *Fry v. Chartered Mercantile Bank of India, &c.*, L. R., 1 C. P. 689, and *Gullischen v. Stewart*, *infra*.

Where, however, the bill of lading states the cargo to have been received as against freight, and other conditions as *per* charter-party, the assignee of the bill of lading, who accepts the cargo thereunder, is liable for the demurrage provided for in the charter-party. *Porteus v. Watney*, 3 Q. B. D. 534, C. A.; *Wegener v. Smith*, 15 C. B. 729; 24 L. J., C. P. 25. See also *Gullischen v. Stewart*, 11 Q. B. D. 186; *affirm.* in C. A., W. N. 1884, p. 26. So, where the cargo is deliverable under a similar bill of lading, the shipowner may be bound by the terms of the charter-party, as against an indorsee of the bill. *The Felix*, L. R., 2 Adm. 273. A bill of lading, signed only by the master, is no estoppel as between the shipowner and the person who has advanced money, on the security of the bill of lading, as to the receipt and shipment of the goods specified in it; *Grant v. Norway*, 10 C. B. 665; 20 L. J., C. P. 93; and, the shipowner may show that the goods were not shipped; *S. C.*; see also *McLean v. Fleming*, and *Brown v. Powell, &c. Coal Co.*, *post*, p. 429; or that the master had given other bills previously for the same goods. *Hubbersty v. Ward*, 8 Exch. 330; 22 L. J., Ex. 113.

By the 18 & 19 Vict. c. 111, s. 3, "every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment,

as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board; provided, that the master or other person so signing, may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims." This section only makes the bill of lading conclusive against the person by whom; *Jessel v. Bath*, L. R., 2 Ex. 267; or, by whose authority; see *Brown v. Powell, &c. Coal Co.*, L. R., 10 C. P. 562; it was signed. In other cases evidence is admissible that the goods were not shipped. S. C.; *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; see also *Meyer v. Dresser*, 16 C. B., N. S., 646; 33 L. J., C. P. 289, *ante*, p. 425. In a case in which, by mistake of the mate, a larger number of bales were represented as having been shipped than really were, and there was some evidence that this was caused by the fraud of the person putting the goods on board, who was the shipper or his vendor, the court held that there was evidence that the misrepresentation was caused "wholly by the fraud of the shipper, &c.," within this section. *Valieri v. Boyland*, L. R., 1 C. P. 382.

When a ship is chartered, and is put up by the master as a general ship, a merchant who ships a cargo on board under bills of lading signed by the master, and in ignorance of the charter-party, is entitled to look to the owners, whose servant the master is, for the safe delivery of the cargo. *Sandeman v. Scurr*, L. R., 2 Q. B. 86; *The Figlia Maggiore*, L. R., 2 Adm. 106; *Hayn v. Culliford*, 3 C. P. D. 410; 4 C. P. D. 182, C. A.

If the master has hypothecated or sold part of the cargo, to raise money for necessary repairs to the ship, he is the agent of the shipowner only, and the shipper is entitled to sue the shipowner on the implied indemnity; *Benson v. Duncan*, 3 Exch. 644, Ex. Ch.; and, he may recover either the actual sum for which the goods were sold; *Campbell v. Thompson*, 1 Stark. 490; or, the price which they would have fetched at the place of delivery; *Hallett v. Wigram*, 9 C. B. 580; 19 L. J., C. P. 281; but, not unless the ship eventually arrived there. *Atkinson v. Stephens*, 7 Exch. 567; 21 L. J., Ex. 329. As to the duty of the master with respect to the cargo, where it has been damaged during the voyage, see *Notara v. Henderson*, L. R., 5 Q. B. 346; L. R., 7 Q. B. 225. He must not sell the cargo, unless in a case of necessity, and without an opportunity of consulting the owners thereof. *Australasian Steam Navigation Co. v. Morse*, L. R., 4 P. C. 222; *Atlantic Mutual Insur. Co. v. Huth*, 16 Ch. D. 474, C. A.

What is a sufficient delivery of the goods, depends either upon the contract or upon the custom and usage. If there be no particular custom, the master must give the consignee reasonable time and opportunity to receive them. *Bourne v. Gatliffe*, 7 M. & Gr. 850. As to evidence of custom in such cases, see *ante*, p. 21, *et seq.*, and p. 420. Mere delivery at a wharf, and there leaving them, without notifying the arrival to the consignee, is not sufficient; and the responsibility continues until actual delivery to a person appointed to receive, or something equivalent to it; or, at least, until proper notice to the consignee has been given, and the goods separated and designated for his use. 3 Kent, Com. 215; see also *Petrocchini v. Bott*, L. R., 9 C. P. 355. Where the goods are, by the charter-party, to be unloaded at S., "at the usual place of discharge, and according to the custom of the port," and there are more than one usual place of discharge, the master is bound to obey the orders of the charterer, as to which of the places the ship is to be taken to unload, although the master has previously taken her to

another of those places, and thereby incurred expense. *The Felix*, L. R., 2 Adm. 273. If the goods are sent for by the consignee by lighter, the captain is responsible for the safety of the goods till the lighter is fully laden; such at least is the custom in the port of London. *Calley v. Wintringham, Peake*, 150, and *Id.*, n.

The clause "shipped in good order and condition" affords evidence that externally, so far as meets the eye, the goods were so shipped. *The Peter der Grosse*, 1 P. D. 414.

Delivery of goods to the servants of the shipowner alongside the vessel is equivalent to delivery on board. *British Columbia, &c. Co. v. Nettleship*, L. R., 3 C. P. 499. As to lien for freight, *vide ante*, pp. 424, 425. As to damages recoverable against the shipowner, *vide Action against carriers—Damages, post*, p. 577, *et seq.*

Where goods carried have sustained a general average loss, the shipowner is bound to take the necessary steps for procuring an adjustment of the general average and securing its payment. *Crooks v. Allan*, 5 Q. B. D. 38.

ACTION ON GUARANTEE.

Warranties and guarantees have acquired distinct technical meanings, and must be separately treated of. The former relate to things; the latter to persons. A guarantee is a contract to answer for the payment of a debt or performance of a duty by another person.

Proof of the Contract. *Statute of Frauds, &c.*] By the Statute of Frauds (29 Car. 2, c. 3), s. 4, no action shall be brought "whereby to charge the defendant upon any special promise to answer for the debt, default, or mis-carriages of another person," . . . "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." It had long been held that, as an "agreement" includes the consideration for the promise, the consideration must also appear, at least by necessary inference, in the writing. *Wain v. Warlters*, 5 East, 10. But, by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, no such promise "shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

Where an order for goods is given by A., for the use of B., and credit given to A., this is not within the statute; for it is the debt of A. and not of B.; *Birkmyr v. Darnell*, 1 Salk. 27; 1 Smith's L. C.; and, where there is no writing, whether A. or B. was made the debtor by the agreement of the parties, is a question for the jury. *Keate v. Temple*, 1 B. & P. 158; *Mounstephen v. Lakeman*, L. R., 7 Q. B. 196, Ex. Ch.; L. R., 7 H. L. 17. If the person for whose use the goods are furnished is liable at all, or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the defendant's promise is void if not in writing. S. C., L. R., 7 Q. B. 202, *per* Willes, J. But, until there is some person primarily liable the section does not apply. S. C., L. R., 7 H. L. 24, *per* Ld. Selborne. The question is, is it a promise to pay the debt of another,

for which the other was, and still remains liable, after the promise is made? If it be, then the statute requires a writing, for it is then a "collateral" and not an original promise. See notes to *Forth v. Stanton*, 1 Wms. Saund. 211 b. If the effect of the agreement is to extinguish or satisfy the debt of another—as if A. promises to pay the amount of B.'s debt to C., if C. will discharge B. from arrest under a *ca. sa.*—then, as B.'s debt is discharged, the debt becomes the debt of A. only, and is not within the statute. *Goodman v. Chase*, 1 B. & A. 297.

The promise must be made to the original creditor, to be within the statute. *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Reader v. Kingham*, 13 C. B., N. S. 344; 32 L. J., C. P. 108; *Cripps v. Hartnoll*, 4 B. & S., 414; 32 L. J., Q. B. 381, Ex. Ch. Thus, a mere promise of indemnity is not within it. *Wildes v. Dudlow*, L. R., 19 Eq. 198; following *Thomas v. Cook*, 8 B. & C. 728, and *Reader v. Kingham*, *supra*; *Batson v. King*, 4 H. & N. 739; 28 L. J., Ex. 327. As where at defendant's request, and for his accommodation, plaintiff drew a bill on A., which was accepted by A., and indorsed by defendant, defendant promising at the time to indemnify plaintiff; and plaintiff was obliged to pay the bill; held, that he might sue defendant as for money paid, and that no written guarantee was necessary. S. C. In order that a promise should fall within the statute there must be some obligation, implied at least, from the person for whom the surety becomes answerable towards the promisee; S. CC.; as the obligation of an arrested debtor towards his bail to pay the debt or surrender, in which case, a promise by a third person to hold the bail harmless is within the statute; *Green v. Cresswell*, 10 Ad. & E. 453; this case, however, has been doubted; see *Reader v. Kingham*, *Wildes v. Dudlow*, and *Cripps v. Hartnoll*, *supra*; and, it is settled that there is no debt or duty in a person bailed on a charge of misdemeanor towards his bail, and hence a similar promise is not in such case within the statute. S. C.

An agreement by a factor to sell goods on a *del credere* commission, is not within the section; for, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the factor receives the consideration. *Couturier v. Hastie*, 8 Exch. 40; 22 L. J., Ex. 97. A "forbearing to press for immediate payment" implies giving a "reasonable time," and this, though indefinite, is a sufficient consideration for a guarantee by a stranger to pay the debt; *semble*, *Oldershaw v. King*, 2 H. & N. 517; 27 L. J., Ex. 120, Ex. Ch.; questioning *Semple v. Pink*, 1 Exch. 74, *contra*; see also *Coles v. Pack*, L. R., 5 C. P. 65. If the consideration for guaranteeing, by the defendant, the payment of past and future debts by A., to the plaintiffs, be the future supplying by them to A. of goods, and there be no agreement binding on them to supply the goods, and no goods are in fact supplied, the guarantee fails for want of consideration. *Westhead v. Sproson*, 6 H. & N. 728; 30 L. J., Ex. 265. A guarantee to a bank in consideration of their "lending to A. 1000*l.*, for seven days, from this date," does not cover an account overdrawn by numerous cheques, together amounting to 1000*l.*, as the advance of 1000*l.* is the consideration for the guarantee, and a condition precedent to its attaching. *Burton v. Gray*, L. R., 8 Ch. 932. An I O U may, since 19 & 20 Vict. c. 97, s. 3, (*ante*, p. 430), be shown to have been given as a guarantee, and will be good as such. See *R. v. Chambers*, L. R., 1 C. C. 341.

As to the form of memorandum and signature thereto, *vide ante*, p. 287, *et seq.*, and also cases decided on Stat. of Frauds, s. 17, *post*, p. 475, *et seq.* Although the signature only of the party to be charged is sufficient, the names of both the contracting parties must appear upon the guarantee; and therefore a guarantee on which the name of the person to whom it is given

does not appear is bad ; *Williams v. Lake*, 2 E. & E. 349 ; 29 L. J., Q. B. 1 ; *Williams v. Byrnes*, 1 Moo. P. C., N. S. 154 ; but, it was said that if the promise were accepted in writing by any one who would furnish goods under the guarantee, it would bind. S. C., *Id.* 198. A letter of defendant to plaintiff, referring to a mortgage not complete, and stating defendant's "willingness to take any responsibility respecting it," is insufficient, there being nothing to explain the transaction referred to, as to amount, interest, or property meant, without oral evidence ; and, though since the 19 & 20 Vict. c. 97, s. 3, oral evidence may supply the consideration, it cannot also explain the promise. *Holmes v. Mitchell*, 7 C. B., N. S. 361 ; 28 L. J., C. P. 301 ; and see *Glover v. Halkett*, 2 H. & N. 487 ; 26 L. J., Ex. 416.

A contract of suretyship arises under the law merchant between the drawer and the indorsee, and between the indorser and subsequent holders of a bill of exchange, *vide ante*, pp. 342, 357 ; but, the indorser is under no such liability to prior parties to the bill ; and to constitute such liability a written memorandum is required. *Steele v. McKinlay*, 5 Ap. Ca. 754, D. P. ; distinguished in *Wilkinson v. Unwin*, 7 Q. B. D. 636, C. A.

On the admissibility of oral evidence to show that the consideration for a guarantee, ambiguously expressed, is not a past consideration, see *ante*, p. 19.

Continuing guarantee. Revocation.] An important point often arises, whether the guarantee is a continuing guarantee—that is, whether the guarantee is confined to one transaction, and is at an end when credit has once been given to the amount guaranteed, or whether it continues in respect of credit given, or debts contracted, from time to time. The answer depends on the language of the instrument, coupled with evidence of the surrounding circumstances, in order to show what was the intention of the parties. *Hefield v. Meadows*, L. R., 4 C. P. 595 ; *Laurie v. Scholefield*, *Id.* 622 ; *Coles v. Pack*, L. R., 5 C. P. 65 ; and *ante*, p. 19. Hence it follows that the decision in one case is no certain guide to the construction of the contract in another ; but, the tendency of the courts is now to construe guarantees as continuing until revoked.

The following are examples of continuing guarantees : "In consideration of the credit given by the C. Co. to my son for coal, supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself, by this note, to pay to the C. Co. whatever may be owing to an amount not exceeding the sum of 100*l.*," the son being, at the time the guarantee was given, indebted to the company for coals delivered on credit. *Wood v. Priestner*, L. R., 2 Ex. 66, 282, Ex. Ch. So, where the defendant gave to the plaintiff, a cattle dealer, this guarantee :—"50*l.* I, M., will be answerable for 50*l.* that Y., butcher, may buy of H.," and it appeared, from the circumstances, under which the guarantee was given, that the parties contemplated a continuing supply of stock to Y., in his trade of a butcher. *Hefield v. Meadows*, *supra*. See also *Laurie v. Scholefield*, cited *post*, p. 434, and *Nottingham Hide, &c. Co. v. Bottrill*, L. R., 8 C. P. 694.

A guarantee given to secure the dealings of a single member, A., of a partnership, does not in general cover transactions of the partnership ; but it will be otherwise, where it appears, from the surrounding circumstances, that the guarantee was intended to include contracts entered into by A., on behalf of his firm. *Leathley v. Spyer*, L. R., 5 C. P. 595 ; see also *Montefiore v. Lloyd*, 15 C. B., N. S. 203 ; 33 L. J., C. P. 49.

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 4, enacts that no promise to answer for the debt, default, or miscarriage of another, made to a firm of two or more persons, or to one person trading

under the name of a firm,—and no promise to answer for the debt, &c., of such a firm or person so trading,—shall be binding on the maker in respect of anything done or omitted to be done, after a change in any one, or more, of the firm or persons so trading, unless the intention, that the promise shall continue to bind, notwithstanding such change, shall appear by express stipulation, or by necessary implication, from the nature of the firm or otherwise. This section is only declaratory of the existing law. *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J., Q. B. 141. Three persons carried on the business of shipbuilders, under the names of G. & W. Hall. No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitution of the partnership, the defendant gave the plaintiff the following guarantee: "In consideration that you have, at my request, consented to open an account with the firm of G. & W. Hall, shipbuilders, I hereby guarantee the payment to you, of the moneys, that at any time may become due, not exceeding 5000*l.*:" held, that the guarantee ceased on the death of one of the partners, as a contrary intention did not appear, by necessary implication, or from the nature of the firm. S. C.

A guarantee by writing, under hand only, for 12 months for the payment of all bills the plaintiff might discount for D., to the extent of 600*l.*, was held revocable by a notice given during the 12 months, although some discount had been made and repaid before notice. *Offord v. Davies*, 12 C. B., N. S. 748; 31 L. J., C. P. 319. As to withdrawal from a guarantee, see further *Burgess v. Eve*, L. R., 13 Eq. 450; *Phillips v. Foxall*, L. R., 7 Q. B., 666. But, a guarantee the consideration for which is given, once for all, cannot be determined by the guarantor, and does not cease on his death. *Lloyds' v. Harper*, 16 Ch. D. 290, C. A. The death alone, of the guarantor, does not revoke an engagement to guarantee the balance of a running account until notice. *Bradbury v. Morgan*, 1 H. & C. 249; 31 L. J., Ex. 462. It is, however, in the absence of express provision, revoked as to subsequent advances by notice of the guarantor's death. *Coulthart v. Clementson*, 5 Q. B. D. 42; but, not as against the survivor of two joint and several co-sureties. *Beckett v. Addyman*, 9 Q. B. D. 783, C. A. See also *Harriess v. Faucett*, L. R., 8 Ch. 866.

Default of principal debtor.] The plaintiff must prove the default of the principal debtor, against which he has been guaranteed by the surety. Admissions made by the principal debtor, or a judgment or award obtained against him by the plaintiff, are not evidence against the surety. *Ex parte Young*, 17 Ch. D. 668, C. A.

Damages.] A guarantee for payment, by the acceptor, of a bill of exchange, includes interest. *Ackerman v. Ehrensperger*, 16 M. & W. 99. "We guarantee that 400*l.* shall be duly paid, in the proportion of 200*l.* each," signed by two persons, does not make them jointly liable to 400*l.*, but is a separate contract as to 200*l.* by each. *Fell v. Gostlin*, 7 Exch. 185; 21 L. J., Ex. 145. An agreement to be answerable for all the costs of, and incidental to, an action to be brought by the plaintiff, entitles him to recover the costs of his own solicitor, though not actually paid at the time of suing on the guarantee. *Spark v. Heslop*, 1 E. & E. 563; 28 L. J., Q. B. 197. The defendant promised to pay the plaintiffs "300*l.* to secure an advance now or hereafter on a banking account with A." They advanced more than 300*l.* to A., who paid his creditors 16*s.* in the £ only; it was held that the defendant's promise was only to repay an advance of 300*l.*, and that he was therefore entitled to the benefit of the dividend thereon. *Geis v. Pack*, 33 L. J., Q. B. 49; following *Bardwell v. Lydall*, 7 Bing. 489; *Thornton v.*

McKewan, 1 H. & M. 525 ; 32 L. J., Ch. 69 ; *Hobson v. Bass*, L. R., 6 Ch. 792 ; *Gray v. Seekham*, L. R., 7 Ch. 680. The surety may, however, waive his right to the share of the composition by the terms of the contract of suretyship ; *Ex parte National Provincial Bank of England*, 17 Ch. D. 98, C. A. ; *Ellis v. Emmanuel*, 1 Ex. D. 157, C. A. ; as where the guarantee is given for a limited amount, and is less than the debt, the amount of which is then ascertained ; S. C. Where a guarantee, given to A., appears to have been so given to him as trustee for B., A. can recover thereon the same damages B. could have recovered if it been given to B. *Lloyds v. Harper*, ante, p. 433.

Defence.

The want of a written memorandum must be pleaded specially. Rules, 1883, O. xix., r. 20, ante, p. 283.

The mere omission, on the part of the principal creditor, to enforce his rights against the principal debtor, does not discharge the surety. *Mansfield Union v. Wright*, 9 Q. B. D. 683, C. A.

Concealment.] The surety may sometimes rely on the concealment of material particulars, by the principal, at the time the contract was made, as a fraud. *Lee v. Jones*, 14 C. B., N. S. 386 ; 17 C. B., N. S. 482 ; 34 L. J., C. P. 131, Ex. Ch. So, in the case of concealment during the pendency of a continuing guarantee. *Phillips v. Foxall*, L. R., 7 Q. B. 666 ; *Sanderson v. Aston*, L. R., 8 Ex. 73. The duty of the principal must always ultimately be measured by the jury, but the judge will have to point out, what their duty is, in this respect ; the language in which he ought to do this has not, however, yet been very precisely settled. A direction that a concealment must be "wilful and intentional, with a view to the advantage they (the principals) were thereby to receive," is wrong. *Railton v. Mathews*, 10 Cl. & F. 934. See further *Davies v. L. & Provincial Marine Insur. Co.*, 8 Ch. D. 469. On the other hand, the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety in entering into the required obligation ; *Owen v. Homan*, 4 H. L. C. 997 ; for, a surety is only entitled to disclosure of any arrangement that may exist between the debtor and creditor, that may make his position different from what he would reasonably expect ; and hence, if a person undertakes to be responsible for a cash credit given to one of the banker's customers, the banker is not bound voluntarily to communicate that the intention is to apply the credit to an old debt due from the customer to the banker ; *Hamilton v. Watson*, 12 Cl. & F. 109, per Ld. Campbell. Accord. *N. British Insur. Co. v. Lloyd*, 10 Exch. 523 ; 24 L. J., Ex. 14. So, where the guarantee was a continuing one, given to a bank to secure advances "not exceeding in the whole 1,000*l.*," it was held no defence, to an action to recover 1,000*l.*, on the guarantee, that the bank had made advances together exceeding 1,000*l.* *Laurie v. Scholefield*, L. R., 4 C. P. 622.

Alteration of position of parties.—Giving time, &c.] Any alteration by a binding agreement in the relative position of the creditor and principal debtor, whereby the latter is released, or the remedy against him is suspended, or the risk of the surety varied, without the surety's assent, will be a discharge of the guarantee. *Polak v. Everett*, 1 Q. B. D. 669, C. A. ; *Lewis v. Jones*, 4 B. & C. 506, and 515, n. ; *Cragoe v. Jones*, L. R., 8 Ex. 81 ; and see cases cited ante, pp. 369, 370. So, any material alteration in the terms of an agreement between the creditor and principal debtor will discharge the surety, provided the agreement forms the basis of the contract of suretyship ;

N. W. Ry. Co. v. Whinray, 10 Ex. 77; 23 L. J., Ex. 261; but, not otherwise; *Sanderson v. Aston*, L. R., 8 Ex. 73. See further *Holme v. Brunskill*, 3 Q. B. D. 495, C. A.

The contract for suretyship is sometimes severable, so that it is only discharged as to part, by an alteration in the position of the creditor and the principal debtor. *Harrison v. Seymour*, L. R., 1 C. P. 518; *Skillett v. Fletcher*, L. R., 1 C. P. 217; L. R., 2 C. P. 469, Ex. Ch.; *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46, C. A.

If the rights against the surety are expressly reserved, the latter is not discharged; *Kearsley v. Cole*, 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 779; 24 L. J., Q. B. 130; *Bateson v. Gosling*, L. R., 7 C. P. 9; and, if the contract of suretyship contains a special clause allowing the creditor to compound with the principal debtor, the surety is not discharged by such compounding; *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J., Ex. 133. The reservation of rights against the surety prevents the latter from being discharged, because the principal debtor cannot then complain that the surety, when he has been obliged to pay the debt, immediately claims to be indemnified by the principal debtor, and that this claim makes the release illusory. *Kearsley v. Cole*, *supra*; *Nevill's case*, L. R., 6 Ch. 43, 47; *Muir v. Crawford*, L. R., 2 H. L., Sc. 456, 458.

Where the liabilities of the principal debtor have been changed by statute during the pendency of the guarantee, the surety is discharged; *Pybus v. Gibb*, 6 E. & B. 902; 26 L. J., Q. B. 41; unless the terms of the guarantee show that it is intended the suretyship should continue; *Oswald v. Berwick*, Mayor of, 5 H. L. C. 856; 25 L. J., Q. B. 383. See *Skillett v. Fletcher*, *supra*.

As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged; a surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as that in which they formerly stood in his hands. See notes to *Rees v. Barrington*, 2 White & Tudor, L. C.; *Wulff v. Jay*, L. R., 7 Q. B. 756. Thus, where the plaintiff held a bill of sale of the debtor's furniture, as security for a debt to him, for which the defendant was surety, but neglected to register it, and although he had notice of the debtor's insolvency, did not seize the furniture under it; and the goods in consequence passed to the debtor's trustee in bankruptcy; it was held that the defendant was discharged to the extent of the value of the goods. *S. C.*, *Id.* See also *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J., Ex. 229; and *Mutual Loan Assoc. v. Sudlow*, 5 C. B., N. S. 449; 28 L. J., C. P. 108; *Lawrence v. Walmesley*, 12 C. B., N. S. 799; 31 L. J., C. P. 143. These rules as to the right of the surety apply as between the acceptor and indorser of a bill where securities had been deposited to secure its payment, and it has been paid at maturity by the indorser. *Duncan v. N. & S. Wales Bank*, 6 Ap. Ca., 1 D. P. In *Polak v. Everett*, 1 Q. B. D. 669, C. A., the distinction is explained between intentional acts which discharge the claim against the surety altogether, and negligent acts which discharge it only to the extent to which the surety has been thereby prejudiced.

In the case of two sureties, A. and B., contracting severally, the creditor does not, by releasing A., thereby break his contract, and so release B., unless

B. can show that he had a right to contribution, which has been taken away or injuriously affected. *Ward v. National Bank of New Zealand*, 8 Ap. Ca. 755, P. C.

A creditor, who holds security for his debt, does not discharge a surety for the debt, by surrendering his security to the trustee in the bankruptcy of the principal debtor, in order to entitle himself to prove for the whole debt. *Rainbow v. Juggins*, 5 Q. B. D. 138, 422, C. A.

As to revocation of guarantee, *vide ante*, pp. 432, 433.

ACTION ON WARRANTY.

A warranty is either express or implied. "Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought, certainly, to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given." *Readhead v. Midland Ry. Co.*, L. R., 4 Q. B. 392, Ex. Ch., *per cur.*; *accord. Francis v. Cockrell*, L. R., 5 Q. B. 184, 193, *per cur.*

Where plans and a specification of a certain work, to be done for A., are prepared as the basis of tenders, A. does not warrant that the work can be done under such plans and specification. *Thorn v. Mayor of London*, 1 Ap. Ca. 126, D. P. So, where the architect takes out the quantities, A. does not warrant their correctness. *Scrivener v. Pask*, L. R., 1 C. P. 715, Ex. Ch.

The most frequent cases in which an action is brought on a warranty, is on the occasion of the sale of goods, and of a representation of authority to enter into a contract on behalf of another person.

Action on Warranty on Sale of Chattels.

Warranty of title.] If a man sells goods, affirming them to be his own, that amounts to a warranty of title. *Cross v. Garnett*, 3 Mod. 261; 1 Show. 63; *Medina v. Stoughton*, 1 Salk. 210; 1 Ld. Raym. 593. But, it would seem that there is in general no implied warranty of title, any more than of quality, on the bare sale of a personal chattel. *Per cur.*, *Morley v. Attenborough*, 3 Exch. 500; *Bagueley v. Hawley*, *infra*. Where a pawnbroker sold an unredeemed pledge at an auction of such pledges, which was bought by the plaintiff, and was afterwards claimed by the right owner, it was held that there was no warranty of title. *Morley v. Attenborough*, *supra*. So, there is no warranty of title on a sale under an execution, nor, on a sale by the purchaser on that occasion to another purchaser, privy to the first sale. *Chapman v. Speller*, 14 Q. B. 621. So, in *Bagueley v. Hawley*, L. R., 2 C. P. 625, the defendant had bought at a public auction a boiler set in brickwork, which had been seized as a distress for poor rate; the plaintiffs bought it of the defendant, with notice of the circumstances under which it had been originally sold, and were to remove the boiler at their own expense, but were prevented so doing by the mortgagees of the premises: it was held that the seller had not warranted his title to the boiler, or that the plaintiffs would be permitted to remove it; Willes, J., dissented, observing that the plaintiffs had purchased a boiler and not a lawsuit. In order to make the seller of personal property liable for a bad title, there must be shown fraud, or ex-

press warranty, or an equivalent to it by declaration, or conduct, or usage of trade. When articles are bought in a shop, professedly kept for the sale of goods, there can be no doubt that the shopkeeper must be considered as warranting that a purchaser will have a good title to keep the goods purchased. In such case the vendor sells as his own, and that is what is equivalent to a warranty of title. So, in the case of an executory contract of sale, there is a warranty of title. *Morley v. Attenborough*, *per cur.*, *ante*, p. 436. Although, therefore, the maxim of *caveat emptor* applies, yet the exceptions 'wellnigh eat up the rule . . . so that there may be difficulty in finding cases to which the rule would practically apply.' *Sims v. Marryatt*, 17 Q. B. 291, *per* Ld. Campbell, C. J. *Accord. Eichholtz v. Bannister*, 17 C. B., N. S. 708 ; 34 L. J., C. P. 105, *per cur.* Where the plaintiff had purchased some pieces of print in the warehouse of the defendant, and received an invoice in which the defendant was described as dealer in prints ; the goods had been stolen, and the true owner claimed them ; and it was held that the defendant had warranted his title to the goods. S. C.

Warranty of quality.] The following arrangement of the different classes of sales, for the purpose of showing in which cases there is an implied warranty of quality, is taken from the judgment in *Jones v. Just*, L. R., 3 Q. B., 197, at p. 202 *et seq.* ; a few cases subsequent to, or not referred to in, that judgment being added :—

1st. Where the goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent and not discoverable on examination, at least where the seller is neither the grower nor manufacturer. *Parkinson v. Lee*, 2 East, 314. So, in the case of the sale in a market of meat, which the buyer has inspected, there is no warranty that the meat is fit for human food. *Emmertton v. Matthews*, 7 H. & N. 586 ; 31 L. J., Ex. 139. A sale by sample falls under this rule, if the sample truly represent the bulk. *Smith v. Hughes*, L. R., 6 Q. B. 597.

2ndly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which may be ascertained by either party, there is no implied warranty. *Barr v. Gibson*, 3 M. & W. 390. So, on the sale of a patent there is no warranty that it is valid. *Hall v. Conder*, 2 C. B., N. S. 22, 53 ; 26 L. J., C. P. 138, 288, Ex. Ch. ; *Smith v. Buckingham*, 18 W. R. 314, H. T. 1870, Q. B.

3rdly. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Chanter v. Hopkins*, 4 M. & W. 399 ; *Ollivant v. Bayley*, 5 Q. B. 288. See *Chalmers v. Harding*, 17 L. T., N. S. 571, H. T. 1868, Ex.

4thly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case, an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Brown v. Edgington*, 2 M. & Gr. 279 ; *Jones v. Bright*, 5 Bing. 533 ; *Mallan v. Radcliffe*, 17 C. B., N. S. 588 ; and, there is no exception as to latent undiscoverable defects ; *Randall v. Newson*, 2 Q. B. D. 102, C. A.

5thly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article ; *Laing v. Fidgeon*, 4 Camp. 169 ; 6 Taunt.

108; *Shepherd v. Pybus*, 3 M. & Gr. 868; even though the sale be by sample; *Mody v. Gregson*, L. R., 4 Ex. 49, Ex. Ch.; see *Macfarlane v. Taylor*, L. R. 1 H. L. Sc. 245. A manufacturer of goods, who is not a dealer, warrants that such goods are made by him. *Johnson v. Raylton*, 7 Q. B. D. 438, C. A.

6thly. Where the contract is to supply goods of a specified description, which the buyer has had no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but, must also be merchantable or saleable under that description. *Bigge v. Parkinson*, 7 H. & N. 955; 31 L. J., Ex. 301; *Gardiner v. Gray*, 4 Camp. 144; *Jones v. Just*, L. R., 3 Q. B. 197; see also *Mody v. Gregson*, *supra*. And, even although the buyer has inspected the bulk, the goods must answer the specified description. *Josling v. Kingsford*, 13 C. B., N. S. 447; 32 L. J., C. P. 94.

By the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), ss. 19, 20, on the sale or contract to sell (whether in writing or not) any article with any trade mark on it, or on what it is contained in, or with any description or indication of the number, quality, measure, or weight, or of the place where it was manufactured or produced, there shall be deemed to have been a warranty of the genuineness of the trade mark, or of the truth of the description, &c., unless the contrary shall have been expressed in writing, signed by or on behalf of the vendor, and delivered to and accepted by the vendee. And by sect. 22, cited *sub tit. Action for infringement of Trade Marks*, *post*, a right of action is specially given to every person aggrieved by the forging or improper use of trade marks.

Remedy where there is a warranty.] Where a horse or other article has been sold warranted, but is in fact not according to the warranty, the purchaser may of course maintain an action upon the warranty; but, in some cases he may rescind the contract, and recover the money paid under a claim for money had and received: as, where by the contract the purchaser has the power of returning the article, if not approved; *Towers v. Barrett*, 1 T. R. 133; or, where the contract is rescinded with assent of the defendant; *per Buller, J., Ib.*; and, the article is returned within a reasonable time; *Compton's case*, cited by Buller, J., in 1 T. R. 136; *Adam v. Richards*, 2 H. Bl. 573; *Street v. Blay*, 2 B. & Ad. 456; and, in the same state as sold, and without using the thing sold after the discovery of the breach; *Harnor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53; *Curtis v. Hannay*, 3 Esp. 82.

But, on the purchase of a specific chattel, it is only where there is a condition in the contract authorising the return, or the vendor has received back the horse or other article, and has thereby rescinded the contract, or has been guilty of a fraud which avoids the contract altogether, that the purchaser may thus recover back the price; *Street v. Blay*, 2 B. & Ad. 462, and the cases there cited; *Gomperts v. Denton*, 1 Cr. & M. 207. Where there is a breach of warranty and no condition for rescinding the sale, the vendee must keep the article and rely upon a cross action, or counter-claim, or prove the breach in reduction of damages when sued for the price. *Street v. Blay*, *supra*; *Poulton v. Lattimore*, 9 B. & C. 259; *Dawson v. Collis*, 10 C. B. 523; 20 L. J., C. P. 116.

If the purchaser sue upon the warranty, he need not return the article sold. *Felder v. Starkin*, 1 H. Bl. 17; *Pateshall v. Tranter*, 3 Ad. & E. 103.

Proof of the sale and warranty.] Where there is no written contract, and the warranty is, (as it often is,) mentioned in the receipt for the purchase-money, the sale and warranty may be proved by the production of the receipt without an agreement stamp. *Skrine v. Elmore*, 2 Camp. 407. A sale for the price of 10*l.* and upwards is within the Stat. of Frauds, s. 17;

but, as the breach of warranty is not usually discovered till after delivery and acceptance of the goods sold, the statute is then complied with, and the contract may be proved by oral evidence.

The plaintiff must in general prove an express warranty; a high price is not tantamount to an implied warranty. *Stuart v. Wilkins*, 1 Doug. 20; *Parkinson v. Lee*, 2 East, 322. The word "warranty" is not essential; but, there may be a mere misrepresentation or opinion of the seller without any intention on either side to give or require a warranty, and this will be a question for the jury. Generally, however, a representation made at the sale is part of the contract, and equivalent to a warranty. *Wood v. Smith*, 5 M. & Ry. 124; *Salmon v. Ward*, *infra*. But, not if the contract be reduced into writing. *Pickering v. Dowson*, 4 Taunt. 779. But, where the evidence of the contract of sale consists of a series of letters which are ambiguous in their terms on the question of warranty, oral evidence of all the surrounding facts and circumstances of the sale is admissible, for the purpose of showing that a warranty was not contemplated between the parties. *Stucley v. Baily*, 1 H. & C. 405; 31 L. J., Ex. 483. A mere invoice describing articles sold does not amount to a warranty of quality. *Rook v. Hopley*, 3 Ex. D. 209. On the sale of pictures, with a bill of parcels having the artist's name attached, it is for the jury to find whether the seller has guaranteed that they are really the works of the artist, or merely intimated his opinion as to the authorship. *Power v. Barham*, 4 Ad. & E. 473. A., a corn-dealer, sold to B., another corn-dealer, some barley as "seed barley," just before bought by sample from a third person. B. knew that A. had so bought it by sample as "seed barley," and that he had not seen it in bulk: held, that this was not evidence of a warranty, but was a mere expression of A.'s belief. *Carter v. Crick*, 4 H. & N. 412; 28 L. J., Ex. 238.

Where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five-year old," &c., to which the defendant answered, "The horse is as I represented it," it was ruled that this was evidence of a warranty at the time of sale. *Salmon v. Ward*, 2 C. & P. 211. Where the seller said, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knew it to be unsound, he was held answerable on this qualified warranty, *viz.*, that "it was sound to the best of his knowledge." *Wood v. Smith*, *supra*. But *quere*; for this seems to be rather a case of fraud than of qualified warranty. Where the warranty was "To be sold, a black gelding, five years old; has been constantly driven in the plough. Warranted," this was held to be only a warranty of soundness. *Richardson v. Brown*, 1 Bing. 344. So, "Received of B. 10l., for a grey four-year old colt, warranted sound," is not a warranty of age. *Budd v. Fairmaner*, 8 Bing. 48. Where there is a manifest defect, a general warranty of soundness will not be deemed to extend to it. *Margetson v. Wright*, 7 Bing. 603. A splint has been held not to be such a manifest defect; S. C., 8 Bing. 454; nor convexity of the cornea of the eye; *Holliday v. Morgan*, 1 E. & E. 1; 28 L. J., Q. B. 9. When a horse is sold with a warranty, by private sale at a repository for the sale of horses, where the terms of the sales are painted upon a board fixed up in a conspicuous situation, a purchaser must be taken to be cognizant of those terms, though nothing is said respecting them, at the time of sale; and if one of the terms is that the warranty of soundness should remain in force until noon next day, unless in the meantime notice of unsoundness should be given by the purchaser, it must be complied with, though the unsoundness is of such a nature as may not be discovered within that time. *Bywater v. Richardson*, 1 Ad. & E. 508. So, where the condition was that a horse not answering the warranty must be returned before a given time after the sale. *Hinch-*

cliffe v. Barwick, 5 Ex. D. 177, C. A. So, where a horse was "warranted sound for one month," it was held that the complaint of unsoundness must be made within one month of the sale. *Chapman v. Gwyther*, L. C., 1 Q. B. 463. The buyer has, however, that time within which to return the horse, though the purchaser had notice of the breach of warranty before he removed the horse, and the horse through an accident became depreciated in value. *Head v. Tattersall*, L. R., 7 Ex. 7. So, although the horse, without default of either party, die before the time has elapsed. See *Elphick v. Barnes*, 5 C. P. D. 321. There are many cases on variances upon warranty of soundness, but the power of amendment makes it needless to notice them.

As to when a warranty arises by implication of law, *vide ante*, pp. 436, 437.

Warranty by agent.] A servant employed to sell a horse has been held to have an implied authority to warrant; *Alexander v. Gibson*, 2 Camp. 555 (the case of a sale at a fair); and, even where the servant of a horse-dealer has express directions not to warrant, but does warrant, the master is bound, unless he has notified to the world that the general authority is limited; *per Bayley, J.*, in *Pickering v. Busk*, 15 East, 45; *Helyear v. Hawke*, 5 Esp. 72; *Howard v. Sheward*, L. R., 2 C. P. 148. But, the doctrine has, according to some authorities, been confined to the case of sales by servants of horse-dealers, who may be supposed to possess a general authority; *Scotland, Bank of, v. Watson*, 1 Dow, 45; *Fenn v. Harrison*, 3 T. R. 760, *per Ashhurst, J.*; *Anon.*, cited 15 East, 407; and, it has been decided that the servant of an owner, not a horse-dealer, entrusted on one particular occasion to sell and deliver a horse, is not by law authorised to bind his master by a warranty; and the buyer, taking a warranty from such an agent, takes it at the risk of being able to prove that he had the principal's authority. *Brady v. Todd*, 9 C. B., N. S. 592; 30 L. J., C. P. 223. *Quere*, Whether, in the case of a foreman, alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse at a fair or other public mart, the authority would be implied; S. C., *per curiam*; *semble*, *per Ashhurst, J.*, in *Fenn v. Harrison*, *supra*, that in the latter case it would not. What is said at the time of the sale is evidence, and may amount to a warranty; *per curiam*, *Brady v. Todd*, *supra*. If the seller repudiates the warranty made by his agent there is no sale; *per curiam*, S. C. Where the horse had been already sold, and the vendor's servant, on delivering him to the purchaser, made certain statements, and signed a receipt for the price containing a warranty, it was held that the vendor was not bound by such statements, nor, by the receipt, no express authority to warrant being shown. *Woodin v. Burford*, 2 Cr. & M. 391. Where the plaintiff wrote to the defendant, referring to the warranty and alleging a breach of it, and the defendant in reply denied that there had been any breach, it was held that the jury were justified in finding a warranty on this evidence. *Miller v. Lawton*, 15 C. B., N. S. 834.

Breach of warranty.] If the breach be denied, the plaintiff must give positive proof of unsoundness, &c., at the time of the sale; a suspicion that a horse was unsound is not sufficient. *Eaves v. Dizon*, 2 Taunt. 343. The term "sound," in the case of a horse, implies the absence of disease, or the seeds of a disease, which impairs the natural usefulness of the animal. *Kiddell v. Burnard*, 9 M. & W. 668. An infirmity, as a temporary lameness, which renders a horse less fit for present use, though not of a permanent nature, and though removed after action brought, is an unsoundness. *Per* *Ld. Ellenborough*, *Elton v. Brogden*, 4 Camp. 281; 1 Stark. 127. A cough,

though not permanent, is therefore an unsoundness. *Coates v. Stephens*, 2 M. & Rob. 157; *Shillitoe v. Claridge*, 2 Chitty, 425. But see *Garment v. Barrs*, 2 Esp. 673, where Eyre, C. J., held that a horse, labouring under a temporary injury or hurt, is not an unsound horse. Roaring is not, it is said, necessarily an unsoundness, unless symptomatic of disease; *Bassett v. Collis*, 2 Camp. 523; but, if it is of such a nature as to incommode the horse when pressed to his speed, it is an unsoundness; *Onslow v. Eames*, 2 Stark. 81. Mere badness of shape (such as may produce cutting or curbs) is not unsoundness; *Dickinson v. Follett*, 1 M. & Rob. 299; *Brown v. Elkington*, 8 M. & W. 132; but, any defect in the structure of a horse, congenital as well as arising from subsequent disease or accident, which diminishes his natural usefulness and renders him less than reasonably fit for present use, is unsoundness; and convexity in the cornea of the eye, making the horse shortsighted, and so inducing a habit of shying, is such a defect; *Holliday v. Morgan*, 1 E. & E. 1; 28 L. J., Q. B. 9. A nerved horse is unsound. *Best v. Osborne*, Ry. & M. 290. Crib-biting is not unsoundness, but vice. *Scholefield v. Robb*, 2 M. & Rob. 210. Whether thrushes, splints, or quidding be unsoundness, is a disputed question; *Bassett v. Collis*, 2 Camp. 524, n.; but a splint which produces lameness is an unsoundness, even before the lameness is produced; *Margetson v. Wright*, 8 Bing. 454. So, a bone spavin. *Watson v. Denton*, 7 C. & P. 85. A chest-foundered horse is unsound. *Atterbury v. Fairmanner*, 8 B. Moore, 32. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Coltherd v. Puncheon*, 2 D. & Ry. 10.

It need not be averred, nor if averred, proved, that the defendant knew of the unsoundness. *Williamson v. Allison*, 2 East, 446.

Damages.] If a horse has been returned, the plaintiff will be entitled to recover the whole price; if kept, the difference between the real value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price paid, in damages. *Caswell v. Coare*, 1 Taunt. 566. If the horse is not tendered to the vendor, the vendee can recover no damages for the expense of his keep. S. C. But, if the vendee had tendered the horse, he may recover for the keep, for such time as would be required to sell him to the best advantage. *McKenzie v. Hancock*, Ry. & M. 436. So, where after notice, to the vendor that the horse might be taken away, it was resold, the vendor is liable for the keep for a reasonable time, which is a question for a jury. *Chesterman v. Lamb*, 2 Ad. & E. 129. Where the vendor rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract. *King v. Price*, 2 Chitty, 416. Where defendant warranted a horse to plaintiff, who resold him with a warranty to C., and the horse proving unsound, C. sued the plaintiff, and he gave notice to the defendant of the action, and offered him the option of defending it, but receiving no answer, he defended the action and failed; it was held that defendant was liable, in an action on the warranty, for the costs of the action brought by C. against the plaintiff. *Lewis v. Peake*, 7 Taunt. 153; and see *Rolph v. Crouch*, L. R., 3 Ex. 44. In *Cox v. Walker*, 6 Ad. & E. 523, n., the plaintiff had bought a horse of the defendant for 100*l.*, and had been offered 140*l.* for him, but the horse proving unsound, plaintiff had been obliged to give up the bargain and to sell it for 49*l.* 7*s.* Ld. Denman, C. J., directed the jury that the plaintiff was entitled to recover the difference between the price at which he had sold and the actual value of the horse, if it had been sound at the time of such sale; and he left to the jury as a measure of such value, the price offered for the horse while in the plaintiff's hands. This ruling was questioned, but the case stood over, after argument, for several terms, and was then compromised. The liability of plaintiff for the breach

of warranty, given on a resale by him, may be alleged and proved as special damage, though the plaintiff had not actually paid the sub-vendee his demand. *Randall v. Raper*, E. B. & E. 84; 27 L. J., Q. B. 266. See also *Josling v. Irvine*, 6 H. & N. 512; 30 L. J., Ex. 78. Where the defendants broke a warranty in not sending hemp that was merchantable, the measure of damages was held to be the difference between what the hemp was worth when it arrived, and what the same hemp would have realised, if it had been shipped in a proper state. *Jones v. Just*, L. R., 3 Q. B. 197. Where the defendant sold a diseased cow to a farmer, warranting that she was free from disease, he was held liable for the value of other cows of the plaintiff which died of the disease, caught from her, if he knew, at the time of the sale, that the plaintiff was a farmer, and might place the cow with others; *Smith v. Green*, 1 C. P. D. 92; for the defendant is liable, for such damages, as are the natural consequence of the breach of warranty; S. C., *Randall v. Newson*, 2 Q. B. D. 102, C. A.

In an action for breach of contract on the sale of food or drugs, the plaintiff may, under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 28, recover, as damages, any penalty in which he may have been convicted under the act in respect of these goods, and the costs paid and incurred by him, if he prove that he innocently sold the goods as he purchased them from the defendant; but the defendant may in answer prove that the conviction was wrong and the costs excessive.

As to damages recoverable on breach of warranty of authority, *vide infra*.

Action on Warranty of Authority.

Where A. contracts on behalf of B. as his agent, but without authority from B., A. is in general not liable as *principal*; *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; unless, he was such in fact; *Carr v. Jackson*, 7 Exch. 382; 21 L. J., Ex. 137; or, unless B. has no existence. *Kelner v. Baxter*, L. R., 2 C. P. 174. See further *ante*, pp. 87, 88. It is, however, now settled that A., by contracting with C. on behalf of B., impliedly warrants that he has authority from B. to enter into the contract; and if he has not such authority he is liable for a breach of the warranty. *Collen v. Wright*, *infra*; *Ex. pte. Panmure*, *post*, p. 443; and, is bound as far as damages will do it, to place C. in the same position as if he had the authority. S. C. See also judgments *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 1, C. A. Other cases decided on a similar principle will be found cited below, and these settle the measure of damages applicable to such actions. Thus, if A., *bona fide*, but falsely, represent to the plaintiff that he is authorised by B. to order goods, and the plaintiff fail in the action against B. for want of such authority, he may recover the value and the costs of the former action in an action against A. *Randell v. Trimen*, 18 C. B. 786; 25 L. J., C. P. 307. So, where the defendant's testator, as agent for G., had let land without authority, he was held liable for breach of warranty that he had authority; and in the damages were included the costs of an unsuccessful chancery suit against G. *Collen v. Wright*, 8 E. & B., 647; 27 L. J., Q. B. 215, Ex. Ch. In a similar action it was held that the proper measure of damages was the value of the term agreed for, and the costs of an abortive chancery suit, but not damages and costs the plaintiff had been compelled to pay to a third person, for the breach of an agreement for a sub-lease of the premises. *Spedding v. Nevell*, L. R., 4 C. P. 212. See also *Simons v. Patchett*, 7 E. & B. 568; 26 L. J., Q. B. 195; *Hughes v. Græme*, 33 L. J., Q. B. 335. F. agreed to sell the plaintiff an estate, representing that he had authority from his co-owners so to do; and, on the co-owners repudiating the contract, the plaintiff sued them for breach thereof, and continued his action after

they had all sworn in answer to interrogatories that F. had no authority from them to contract, and was non-suited; it was held, that in an action against F., for breach of warranty of authority, the plaintiff could recover the costs of the action against the others, down to the time when the answers to the interrogatories had been received and considered, and the difference between the contract price and the market price of the estate, of which latter, the price for which the estate was subsequently sold, was *prima facie* evidence. *Godwin v. Francis*, L. R., 5 C. P. 295. Where, however, the plaintiff must anyhow have failed in his previous action by reason of the contract on which he sued being oral only, the costs of that action are not recoverable from the agent. *Pow v. Davis*, 30 L. J., Q. B. 257. A. being instructed by B. to apply for shares, in A.'s name, in a company C., by mistake applied for shares in a company D., which were accordingly allotted to B., and repudiated by him; the company D., had a large number of shares unallotted and the shares were worthless in the market; A. was held liable, to the company D., for the full amount of the shares. *Ex pte. Panmure*, 24 Ch. D. 367, C. A.

Where A., a banker, on the faith of a statement made to him by B. and C., the directors of a company, that they had appointed D. manager of the company, and had authorised him to draw on the company's account with A., made advances on cheques so drawn by D.; B. and C. had no power to confer this authority on D., but acted *bona fide*; it was held, that B. and C. were liable to A., for the advances so made by him, on the ground that they had warranted to A., that D. had authority to bind the company. *Cherry v. Colonial Bank of Australasia*, L. R., 3 P. C. 24. So, where the plaintiff lent money to a building society, which had no power to borrow money, the directors, signing the deposit note, were held liable to an action on their implied warranty of authority, for the amount of the loan, it not appearing that the company was insolvent. *Richardson v. Williamson*, L. R., 6 Q. B. 276; see also *Chapleo v. Brunswick Building Soc.*, 6 Q. B. D. 696, C. A. So, the directors of a railway company were held liable for issuing a debenture exceeding the borrowing powers of the company. *Weeks v. Propert*, L. R., 8 C. P. 427. So, where the directors of a company, which had no power to issue bills, accepted a bill for, and on behalf of the company, they were held liable to a *bona fide* holder for value. *W. London Commercial Bank v. Kitson*, 12 Q. B. D. 157. This principle does not apply where the misrepresentation is not one of fact, but an erroneous representation of law. *Beattie v. Ebury, Ltd.*, L. R., 7 Ch. 777; affirm. on other grounds, L. R., 7 H. L. 102. See also *McCullin v. Gilpin*, 5 Q. B. D. 390.

ACTION ON PROMISE OF MARRIAGE.

Either a man or woman may sue for breach of promise of marriage; *Harrison v. Cage*, 5 Mod. 411; although an attempt was made in that case to resist an action by the former, on the ground that marriage is not an advancement for a man. As an infant may enforce an advantageous contract, although not bound hereby, an infant may sue a person of full age for breach of promise of marriage. *Holt v. Ward*, 2 Str. 937; per Ld. Ellenborough, C. J., in *Warwick v. Bruce*, 2 M. & S. 209. A married man may be sued on a promise of marriage to the plaintiff, although he was married when he promised, provided the plaintiff was ignorant of the fact; and the plaintiff's remaining unmarried on the faith of such promise is a sufficient consideration, and the inability of the defendant to marry the plaintiff is a sufficient breach. *Milward v. Littlewood*, 5 Exch. 775; *Wild v. Harris*, 7

C. B. 999. This action falls within the general rule *actio personalis moritur cum persona*, and cannot be maintained by an executor or administrator; *Chamberlain v. Williamson*, 2 M. & S. 408; unless, perhaps, under peculiar circumstances, as where a strictly pecuniary loss has accrued to the deceased, and the personal estate been damaged accordingly; which special damage must be stated on the record, for it will not be intended; *per cur.*, *Id.* 416.

Until recently the parties to this action were not competent as witnesses; see *ante*, p. 153; but now by 32 & 33 Vict. c. 68, s. 2, "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Evidence that the plaintiff said to the defendant, that he had promised to marry her, and that the defendant did not deny it, is sufficient to satisfy this section. See *Bessela v. Stern*, 2 C. P. D. 265, C. A.

Proof of the contract.] To maintain this action, the plaintiff must prove, under a traverse, the contract and promise of the defendant as stated. The promises must be mutual, the reciprocity constituting the consideration. *Harrison v. Cage*, *ante*, p. 443; 1 Rol. Ab. 22, pl. 20. At first, it was held that mutual promises to marry came within the Stat. of Frauds, s. 4; Com. Dig. Action on the Case upon Assumpsit (F. 3); but in Bull. N. P. 280 c, a contrary doctrine is laid down, and it is now settled that the promises need not be in writing. *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Ld. Raym. 387, note at end of case. And, if written evidence of the contract be produced, no stamp is required. *Orford v. Cole*, 2 Stark. 351. A promise, on the part of a woman, may be presumed from such circumstances of acquiescence, or tokens of approval, as usually attend the acceptance of an offer of marriage; her presence when the offer was made, and the consent of parents asked, without her making any objection; her subsequent reception of the suitor's visits, and concurrence in the arrangements for the wedding; her demeanour as one consenting and approving, &c. Express consent in words is not necessary. *Daniel v. Bowles*, 2 C. & P. 553; *Hutton v. Mansell*, 3 Salk. 16. But, to prove a promise by a man more would be necessary, neither the usages of society, nor considerations of delicacy interfering to restrain an explicit declaration on his part. A promise to marry generally is, in law, a promise to marry within a reasonable time; and, although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances a more general promise. *Potter v. Deboos*, 1 Stark. 82; *Phillips v. Crutchley*, 1 Moore & P. 239. But, a promise to marry after a certain event will not support a claim on a general promise if the qualification is properly pleaded in the defence. *Atchinson v. Baker*, Peake, Add. Ca. 103.

Breach.] To prove the breach of the promise, if denied, evidence must be given, either that the defendant has married another person, so that performance is no longer possible; or, that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it is sufficient that the father of a female plaintiff demanded performance of the defendant. *Gough v. Farr*, 2 C. & P. 631. Where the defendant has promised to marry the plaintiff on the death of his father, the marriage of the defendant to another woman, during the father's lifetime, gives the plaintiff an immediate right of action. *Frost v. Knight*, L. R., 7 Ex. 111, Ex. Ch.

Damages.] The affluent circumstances of the defendant are evidence on the question of damages; and not merely the loss of an establishment in life, but the injury to the plaintiff's feelings, may be considered by the jury; and, in this respect the measure of damages is different from that which is adopted in the case of other contracts. *Smith v. Woodfine*, 1 C. B., N. S. 660; *Berry v. Da Costa*, L. R., 1 C. P. 331. It is no misdirection to tell the jury that, in estimating the damages, they may take into consideration the altered social position of the plaintiff, in relation to her home and family, by the defendant's having seduced and deserted her. S. C. It seems doubtful whether evidence of such seduction can be given in aggravation of damages unless it be specially pleaded. See *Millington v. Loring*, 6 Q. B. D. 190, C. A.

Evidence of character.] Where the defendant, by his defence, sets up a general charge of immodesty, the plaintiff may, in the first instance, give general evidence of good character for modesty and propriety of demeanour; though, this could not be done in the case of a specific charge of immoral acts. *Jones v. James*, 18 L. T., N. S. 243, E. T. 1868, Ex.; and see *Evidence of character*, ante, p. 83. Where a plea alleged that the agreement was made on the faith that the plaintiff would not so immodestly conduct herself with regard to other men as to give reasonable grounds for belief that she allowed other men to have carnal knowledge of her; and then justified on the ground that she had so misconducted herself, the names of the men to whom it was alleged she had so conducted herself being given as particulars; it was held that the plea contained a general charge of immodesty, and that evidence of character was admissible as part of her case. *Jones v. James*, supra.

Costs.] As to plaintiff's right to costs, vide ante, p. 276, et seq. The county court has no jurisdiction to entertain an action for breach of promise of marriage; 9 & 10 Vict. c. 95, s. 58.

Defence.

If, after entering into a contract of marriage, either party discover gross immorality or depraved conduct in the other, it may be pleaded in bar of the action; thus, brutal and violent conduct in the man, accompanied with threats of ill-usage to the woman, goes to the ground of the action; *Leeds v. Cook*, 4 Esp. 258; and if a man has made a promise of marriage to one whom he supposes to be a modest person, and he afterwards discovers her to be a loose and immodest woman, and he on such account refuses to fulfil his promise, he is justified in so doing; *Irving v. Greenwood*, 1 C. & P. 350. To entitle the defendant to a verdict on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty or perjury, etc.) were made against the plaintiff, which plaintiff promised, but failed, to explain: the defendant must show that the charges are well founded. *Buddeley v. Mortlock*, Holt, N. P. 151. To show the general bad character of the plaintiff, where such evidence is relevant, evidence of general reputation is admissible. *Foulkes v. Sellway*, 3 Esp. 236. Material misrepresentation, of the real circumstances of the family and previous life of the plaintiff, may be a good defence to the action; as, where the plaintiff's father and brother told the defendant that she would have property from her father (who was insolvent), and denied that she had ever been (as in fact she had been) a barmaid. *Wharton v. Lewis*, 1 C. & P. 529. The plaintiff was in this case, living with the relations who misrepresented

her, and was probably presumed to be privy to their statements. Letters written by the plaintiff's father, with her knowledge, are evidence against her, though she would not be answerable for particular expressions in them; but, a false representation, made orally by the father to a third person in the absence of the plaintiff and without her privity, and by such person communicated to the defendant, is not admissible. *Foot v. Hayne*, 1 C. & P. 546.

A pre-contract on the part of the plaintiff to marry another person, which the plaintiff concealed from the defendant at the time of his promise, is no defence to the action, without fraud. *Beechey v. Brown*, E. B. & E. 796; 29 L. J., Q. B. 105. Nor, is bodily infirmity supervening, and rendering it dangerous to the defendant's life to marry. *Hall v. Wright*, E. B. & E. 746, 765; 27 L. J., Q. B. 345; 29 L. J., Q. B. 43, Ex. Ch. So, insanity in the plaintiff, existing unknown to the defendant previously to his promise, is no defence. *Baker v. Cartwright*, 10 C. B., N. S. 124; 30 L. J., C. P. 364.

An exoneration, by the plaintiff of the defendant, from his promise, may be implied from the conduct and demeanour of the parties; the total cessation of intercourse and correspondence for two or three years, is evidence for the jury, on a defence of exoneration; although on the last occasion they were seen together, the plaintiff refused to give up the defendant's letters, saying it would be like giving him up altogether. *Davis v. Bomford*, 6 H. & N. 245; 30 L. J., Ex. 139.

Infancy is a defence to the action, and the contract of marriage is within the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), cited *sub tit.*, *Defences to Actions on Simple Contract*.—Infancy, *post*, and cannot, therefore, be ratified after full age. *Coxhead v. Mullis*, 3 C. P. D. 439; and evidence of mere ratification does not amount to a fresh promise. S. C. Where, however, the parties continue to associate together after the defendant has attained full age, as they did before, it can rarely happen that there is not *some* evidence for the jury of a fresh promise. See *Northcote v. Doughty*, 4 C. P. D. 385. Thus, fixing the wedding day was held to be such evidence. *Ditcham v. Worrall*, 5 C. P. D. 410, *diss.* Ld. Coleridge, C. J.

ACTION ON AN AWARD.

In an action on an award, the plaintiff must prove the submission and award, and the performance by himself of any conditions precedent put in issue by the pleadings. Where the submission is by a judge's order, which has been made an order of court, it is sufficiently proved by production of the office copy of the latter order. *Still v. Halford*, 4 Camp. 17; *Selby v. Harris*, 1 Ld. Raym. 745; *vide ante*, p. 106. But, not when the submission is by deed or written agreement; for the rule or order of court gives it no binding effect, and is, or may be, obtained *ex parte*. *Berney v. Read*, 7 Q. B. 79. In that case the rule or order was evidently not obtained by the party *against* whom it was offered. It is necessary to prove the submission of all parties to arbitration, for without such proof it does not appear that the arbitrator had competent authority to decide the question between the parties. *Ferrer v. Owen*, 7 B. & C. 427; *Brazier v. Jones*, 8 B. & C. 124. If the time for making the award has been enlarged, and the award made within the enlarged time, the plaintiff must show (if it be put in issue) that the enlargement was duly made according

to the terms of the submission, or by the consent of the parties, or under the powers granted by the stat. 3 & 4 Will. 4, c. 42, s. 39, or the C. L. P. Act, 1854, s. 15. As to the construction of these sections, see cases collected in Day's Common Law Procedure Acts, 4th ed., pp. 256, 257; *Lord v. Lee*, L. R., 3 Q. B. 404; *In re Dare Valley Ry. Co.*, L. R., 4 Ch. 556, n., and 554; *Denton v. Strong*, L. R., 9 Q. B. 117. If the enlargement was irregularly made, such irregularity is waived by the appearance of the parties having knowledge of it, without objection, before the arbitrator after the enlargement; *Re Hick*, 8 Taunt. 694; *Tyerman v. Smith*, 6 E. & B. 719; 25 L. J., Q. B. 359; so, if the time had not been enlarged at all; *Lawrence v. Hodgson*, 1 Y. & J. 16. Such appearance of the parties may be evidence of a new oral submission, for an award to be made within a reasonable time. *Bennett v. Watson*, 5 H. & N. 831; 29 L. J., Ex. 357. But, though the parties appear and take part in the reference, if they protest at the time, the objection is not waived. *Ringland v. Lowndes*, 17 C. B., N. S. 514; 33 L. J., C. P. 337, Ex. Ch.; so, the objection is not waived, if it goes to the jurisdiction of the arbitrator over the subject-matter; *Davies v. Price*, 34 L. J., Q. B. 8 Ex. Ch. And, if the award be not made within the time limited by the submission, and one of the parties, not knowing the fact, takes up the award, his so doing will not be a waiver of the conditions as to time stated in the submission. *Darnley, El. of, v. L. C. and Dover Ry. Co.*, L. R., 2 H. L. 43. The plaintiff need not prove that the defendant had notice of the award; for he is bound to take notice of the award as well as the plaintiff. 2 Wms. Saund. 62 (4). Where the award states a "request" to the defendant to pay, this is equivalent to an order to pay. *Smith v. Hartley*, 10 C. B. 800; 20 L. J., C. P. 169. So, where after issue joined, a cause was referred, and although there was no power to direct a verdict to be entered, the arbitrator ordered that there should be a verdict for the plaintiff for a certain sum: this was held good as an award of that sum to the plaintiff, on which an action for the amount could be maintained; *Everest v. Ritchie*, 7 H. & N. 698; 31 L. J., Ex. 350; and, where an award directs payment to an arbitrator, or to a stranger, for the use of the plaintiff, the plaintiff may sue on it for the money; *Wood v. Adcock*, 7 Exch. 468; 21 L. J., Ex. 204, Ex. Ch. An award to be made by two arbitrators must be signed by them, in the presence of each other, and at the same time and place, and it is no award unless so signed. *Wade v. Dowling*, 4 E. & B. 44; 23 L. J., Q. B. 302; *Peterson v. Ayre*, 15 C. B. 724; 23 L. J., C. P. 129.

If the award be by an umpire, or by the arbitrators and an umpire, the appointment of the latter must be proved. *Still v. Halford*, 4 Camp. 19. In the absence of any clause to the contrary, the arbitrators may make a valid appointment of an umpire after the time for making the award has expired, if it be within the time limited for the umpirage. *Harding v. Watts*, 15 East, 556; *Holdsworth v. Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289, Ex. Ch. When the arbitrators have agreed on an umpire, they need not sign the appointment at the same time, or together. *In re Hopper*, L. R., 2 Q. B. 367.

In practice there is usually a witness to the execution of an award, who, if the execution is disputed, is generally called; but unless the submission requires it, attestation is unnecessary; and in general, therefore, an award may be proved like any other deed or writing, viz., by proof of the arbitrator's handwriting.

As to awards of commissioners under the Inclosure Acts, see *Proof of Awards*, ante, p. 143.

When the business of a company, incorporated under the Companies Act, 1862, and being voluntarily wound up, is transferred to another company, and the amount to be paid by the company to a dissenting shareholder for

the purchase of his interest (sect. 161) has been settled by arbitration (sect. 162), he may maintain an action against the company on the award so made. *De Rosaz v. Anglo-Italian Bank*, L. R., 4 Q. B. 462.

Defence.

A denial of the making of the award will now be taken to put in issue its making in point of fact only, and not its validity in law. See Rules, 1883, O. xix., rr. 15, 20, *ante*, pp. 283, 284. *Adcock v. Wood*, 6 Exch. 814, 20 L. J., Ex. 435. Nor, could the defendant under such a defence show that it was set aside. See *Roper v. Levy*, 7 Exch. 55; 21 L. J., Ex. 28.

A defence of an oral agreement to pay a less sum, at an earlier date, than that named on the award, and payment thereunder, is good, by way of accord and satisfaction after breach, by non-payment of the first instalment; and is proved, although the payment was made and accepted after the substituted day, if the plaintiff received the payment and made no objection on the ground of its being too late. *Smith v. Trowsdale*, 3 E. & B. 83; 23 L. J., Q. B. 107.

Corruption or misconduct of the arbitrators is not matter of defence; at least, where application might have been successfully made to the court to set the award aside. 1 Wms. Saund. 327 a. (3); *Wills v. Maccarmick*, 2 Wils. 148; *Braddick v. Thompson*, 8 East, 344; *Brazier v. Bryant*, 3 Bing. 167; *Grazebrook v. Davis*, 5 B. & C. 534; *Whitmore v. Smith*, 7 H. & N. 509; 31 L. J., Ex. 107. The omission to give one of the parties an opportunity of being heard, is misconduct of the arbitrators, and falls within this rule. *Thorburn v. Barnes*, L. R., 2 C. P. 384. Nor, can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake. *Johnson v. Durant*, 2 B. & Ad. 925. But, the defendant may show that it is not conformable to the submission, where the defence is properly pleaded.

Although an award is not final if it do not award costs in some way, where they are in the discretion of the arbitrator, yet if the submission can be made an order of court, the amount need not be specified, as the taxing-master has jurisdiction over them; and the costs need not have been taxed before action brought. *Holdsworth v. Barsham*, 4 B. & S. 1; 32 L. J., Q. B. 289, Ex. Ch.

As to calling the arbitrator as a witness to show that he has exceeded his jurisdiction in making his award, which was good on the face of it, see *Buccleugh, Dk. of, v. Metropolitan Board of Works*, L. R., 5 H. L. 418, cited *ante*, p. 155.

It may be observed that, where the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for the amount cannot be maintained until a conveyance of the land has been executed. *E. London Union v. Metropolitan Ry. Co.*, L. R., 4 Ex. 309.

ACTION ON A SOLICITOR'S BILL.

By the J. Act, 1873, s. 87, the time-honoured name of "attorney-at-law" was abolished, and attorneys and solicitors are now all called "solicitors of the Supreme Court," *vide post*, p. 450.

In an action upon a solicitor's bill, the plaintiff must prove, when denied

(1), his retainer as solicitor by the defendant; which may be done by showing either an express retainer, or that the defendant attended at his office, and gave directions, or in other ways recognised his employment; (2), that the business was done; which may be proved by a clerk, or other agent, who can speak to the existence of the cause, or the business in respect of which the charges are made, and can prove the main items.

Retainer.] Proof of a judge's order, referring the bill to be taxed, and of the defendant's undertaking to pay the taxed costs, and of the master's *allocatur*, will be sufficient proof both of the retainer and of the business having been done. *Lee v. Jones*, 2 Camp. 496. In an action against an ordinary corporation, the plaintiff must show a retainer under seal. *Arnold v. Poole, Mayor of*, 4 M. & Gr. 860; *Sutton v. Spectacle Makers Co.*, 10 L. T., N. S. 411, E. T. 1864, Q. B. But, in the case of commercial companies incorporated by act of parliament, such as railway companies, there is usually a power to retain solicitors and other like officers without a retainer under seal. So, such power is conferred on companies incorporated under the Companies Acts, 1862, 1867, by sect. 37 of the latter act. And, where by an act of parliament, the directors of a railway company had power to appoint and displace officers, this was held to extend to an attorney, who therefore need not be appointed under the common seal of the company. *R. v. Cumberland, Justices of*, 5 D. & L. 43, n.; 17 L. J., Q. B. 102. And, where the retainer, by a common law corporation, is by resolution only, such retainer is sufficient to warrant payment by the corporation, though it may not be sufficient to found an action against them. *R. v. Lichfield*, 10 Q. B. 534. The liquidator of a company, is not personally liable to the solicitor employed by him, in a voluntary liquidation, for the costs thereof; *In re Trueman's Estate*, L. R., 14 Eq. 278; nor, in a compulsory liquidation; *Ex pte. Watkin*, 1 Ch. D. 130. When several actions against several defendants are consolidated, and are to abide the event of one, the same solicitor having been retained by each of the defendants, he is entitled to hold all the defendants liable to the costs of the action tried, as on a joint retainer. *Anderson v. Boynton*, 13 Q. B. 308. Though a lessee or mortgagor is usually to pay the expenses of the lease or mortgage, yet he is not directly liable for them to the solicitor of the lessor, or mortgagee, who prepared the instruments; *Rigley v. Daykin*, 2 Y. & J. 83; but slight evidence is sufficient to show direct liability, as that the solicitor received instructions from the lessee, and was desired by him to send the bill of costs to him; *Smith v. Clegg*, 27 L. J., Ex. 300; *Webb v. Rhodes*, 3 N. C. 732. As to the liability of the husband for the costs of preparing a marriage settlement, see *Helps v. Clayton, et ux.*, 17 C. B., N. S. 553; 34 L. J., C. P. 1; it must, however, be observed that in this case the *dicta* were made *obiter*, as the action was brought upon the retainer of the wife, given *dum sola*. As to the liability of the husband, on the retainer of his wife, living apart from him, see *Wilson v. Ford*, L. R., 3 Ex. 63.

Admittance, Certificate, &c.] The stat. 6 & 7 Vict. c. 73, s. 2, prohibits any person from acting in any way as solicitor unless duly admitted, enrolled, and qualified. By sect. 31 no solicitor shall prosecute or defend suits, in his own or another's name, whilst in prison, nor sue for fees, rewards, or disbursements, in respect of any business done by him whilst such prisoner.

By the Stamp Act, 1870, s. 59, (1) "Every person who in any part of the United Kingdom (a) directly or indirectly acts or practises in any court as an attorney, solicitor," &c., "without having in force at the time a duly stamped certificate according to the provisions" of that act; "(b) on applying for any such certificate does not truly specify the facts and circumstances

upon which the amount of duty chargeable upon his certificate depends: shall forfeit the sum of 50*l.*, and shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity."

By the Attorneys and Solicitors' Act, 1874 (37 & 38 Vict. c. 68), s. 12, "No costs, fee, reward, or disbursement on account of, or in relation to, any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever." A person is duly qualified for the purposes of this section, if he have a stamped certificate in force, or be appointed solicitor to some public department.

The above enactments are wider than 6 & 7 Vict. c. 73, s. 26, which was held only to disable an uncertificated attorney from suing for fees in respect of business done by him in some court referred to in that act. *Richards v. Suffield, Ltd.*, 2 Exch. 616; *Greene v. Reece*, 8 C. B. 88. And, it did not apply where a client had taken out an order of course for taxation of the bill, with the usual submission to pay what was found to be due. *In re Jones*, L. R., 9 Eq. 63.

An attorney of one court could not practise in another court without signing the roll (6 & 7 Vict. c. 73, s. 27), nor, could he recover his fees till he had so done. *Latham v. Hyde*, 1 Cr. & M. 128; *Vincent v. Holt*, 4 Taunt. 452. So, in an action by several partners, attorneys, for business done in a local court, it appearing that only one of the plaintiffs was an attorney of that court, it was held that they could not jointly recover. *Arden v. Tucker*, 1 M. & Rob. 191. All the superior courts, except the House of Lords, are now consolidated together, and constitute one Supreme Court of Judicature (J. Act, 1873, s. 3; Bkey. Act, 1883, s. 93 (1)), and all attorneys and solicitors are now solicitors of that court (J. Act, 1873, s. 87). Signature of the roll of that court only will therefore entitle a solicitor to practise in any division of the Supreme Court.

Signed bill. Special agreement.] The last act which requires delivery of a bill before action is 6 & 7 Vict. c. 73. By sect. 37 of that act, no solicitor, nor any executor, administrator, or assignee of any solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such solicitor, until the expiration of one [calendar] month after such solicitor, or executor, administrator, or assignee of such solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, &c., which bill shall either be *subscribed* by the solicitor or by any of the partners, with his own name or with the name or style of the partnership, or of the executor, administrator, or assignee of such solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill. Provided that it shall not be necessary in the first instance for such solicitor, &c., to prove the contents of the bill delivered, sent, or left; but it shall be sufficient to prove that a bill, subscribed or enclosed as aforesaid, was delivered, sent, or left; but nevertheless, it shall be competent for the other party to show that the bill so delivered, &c., was not such a bill as constituted a *bona fide* compliance with this act.

The case of bills, for business in the Houses of Lords and Commons respectively, is provided for by 12 & 13 Vict. c. 78, and 10 & 11 Vict. c. 69, extended by 42 & 43 Vict. c. 17.

The 6 & 7 Vict. c. 73, repeals 2 Geo. 2, c. 23, on which many cases

were decided, and the present act is expressed in language, in general sufficiently different, to make most of them inapplicable to it. Those decisions only are here retained which, from the similarity of the language used, are not manifestly useless.

One distinction between this act and the former seems to be, that the power of taxing bills now extends to bills for *any business* done by a solicitor. It is no longer confined to proceedings taken in a court, and the only qualification is one evidently implied, though not expressed, *viz.*, that it should be done *as solicitor*. In all such cases a bill must be delivered, sent, or left in the manner required by sect. 37. See *Smith v. Dimes*, 4 Exch. 32, 40, *per cur.*

By 12 Geo. 2, c. 13, s. 6, an attorney might sue another attorney for agency business, without delivering any bill; but this act is repealed, and the present act contains no such exception. It also requires assignees and personal representatives of solicitors to deliver bills. In some cases (as *In re Gedye*, 2 D. & L. 915, and *In re Simons*, 3 D. & L. 156), it had been held that agency business was virtually excepted out of the 6 & 7 Vict. c. 73. But, in *Billing v. Coppock*, 1 Exch. 14, where an attorney employed another attorney to defend an indictment, the bill delivered by the latter to the former was held taxable; and it seems to follow that the delivery of a bill is obligatory. *Accord. Smith v. Dimes*, 4 Exch. 32. The cases on the effect of including taxable and untaxable items in the same bill are no longer retained, both because all business seems to be now taxable, and because many of the old distinctions were founded on no clear principle, and are not likely to govern the construction of the existing act.

A solicitor's bill cannot be recovered on an account stated, without proof of the delivery of the bill, though the amount has been admitted. *Eicke v. Nokes*, 1 M. & Rob. 359; *Brooks v. Bockett*, 9 Q. B. 847. But the solicitor may recover on a promissory note given for the amount. *Jeffreys v. Evans*, 14 M. & W. 210.

As to setting off a solicitor's bill, see *post*, tit. *Defences—Set-off*.

An agreement entered into by a client with his attorney to pay him at a certain special rate for business to be done was not binding, or, at all events, not conclusive upon the client. *Drax v. Scroope*, 2 B. & Ad. 581. Such an agreement was void, at least to the extent that the attorney could not recover on it, a larger sum than the master would allow on taxation; and therefore, a bill in which a gross sum is charged by the attorney as per agreement, without given specific items, so as to enable the master to tax them, was not a compliance with the 6 & 7 Vict. c. 73, s. 37. *Philby v. Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370. But, in the absence of a defence pleaded, of no signed bill delivered, a solicitor might prove and recover a specific sum agreed to be paid. *Searth v. Rutland*, L. R., 1 C. P. 642. A solicitor employed as clerk to a public board, at a fixed salary, can recover his salary, although part of the work be done as a solicitor, without having delivered a bill of such part. *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17. So, an agreement between a solicitor and his client, that the former shall be paid a fixed yearly salary, to be clear of all expenses of his office, and to include all emoluments, he paying to his client any surplus that may arise, of receipts over payments, and undertaking to do no work for any other client, is legal. *Galloway v. London, Cor. of*, L. R., 4 Eq. 90.

Now by the Attorneys and Solicitors' Act, 1870 (33 & 34 Vict. c. 28), s. 4, a solicitor "may make an agreement in writing with his client respecting the amount, and manner of payment," for his fees or disbursements, &c., either by a gross sum, or commission, or salary, but where the agreement is in respect of business transacted in court, the amount payable thereunder shall not be received by the solicitor until the agreement has been approved by a taxing.

officer. A receipt containing the terms of an agreement, assented to by the client, but signed by the solicitor only, is insufficient. *Ex parte Munro*, 1 Q. B. D. 724. There must be an agreement in writing signed by both parties. S. C., *Id.* 727, per Ld. Coleridge, C. J. By sect. 8, no action shall be brought to enforce such agreement, but the same may be enforced by the court on motion. This section applies only to an action to recover the agreed remuneration, and does not prohibit an action for refusing to allow the work to be done. *Rees v. Williams*, L. R., 10 Ex. 200. An agreement under this act obviates (see sect. 15) the objection of no signed bill having been delivered, when an action is brought to enforce a solicitor's charges.

Now by the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), ss. 2, 9, the last-mentioned act does not apply to any "business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business." But by sect. 8 (1), in respect of such business it shall be competent for a solicitor and client, before or after or in the course of such business, to make an agreement for the remuneration of the solicitor to such amount, and in such manner, as they shall think fit, by a gross sum, or by commission or per centage, or by salary or otherwise. (2) "The agreement shall be in writing, signed by the person to be bound thereby, or by his agent in that behalf." (3) The agreement may be made on the terms that the remuneration shall or shall not "include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters." (4) "The agreement may be sued and recovered on or impeached and set aside in like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." Where an action is brought on such an agreement, the defence of no signed bill will not be available.

Delivery of the bill, how and to whom.] Where the non-delivery of a signed bill is pleaded, plaintiff must prove that the bill was not only delivered, but left with the defendant for examination. *Brooks v. Mason*, 1 H. Bl. 290. Showing and explaining the bill without a regular delivery is not sufficient. *Crowder v. Shee*, 1 Camp. 437. It has been held not sufficient to prove that the bill was delivered at a particular place not shown to be the defendant's abode, and that the defendant afterwards delivered it to his attorney's clerk; *Eicke v. Nokes*, M. & M. 303; unless it appears that the defendant had it in his possession a month before action; per Alderson, B., *Eggington v. Cumberledge*, 1 Exch. 271; in which case a delivery of a bill by a local attorney, to the general attorney of a company, who submitted it to the provisional committee, one of whom present was the defendant, a month before action, was held sufficient. *Accord. Phipps v. Daubney*, 16 Q. B. 514; 20 L. J., Q. B. 273, Ex. Ch. A delivery at the office of a public company, or to a person representing it, would be sufficient; but, a delivery to one provisional committee-man at his private place of business is not sufficient alone, as against a co-committee-man; *Edwards v. Lawless*, 6 C. B. 329; but, if two be shown to be joint contractors, the delivery to one is good as against the other. *Mant v. Smith*, 4 H. & N. 324; 28 L. J., Ex. 234. See also *Blandy v. De Burgh*, 6 C. B. 623.

The delivery of the bill to the attorney of the party has been held good, where that attorney had obtained the order for delivery of the bill; *Vincent v. Slaymaker*, 12 East, 372; or, where the party himself afterwards attended the taxation. *Warren v. Cunningham*, Gow, 71. So, a delivery to one of the retaining persons, who has been authorised to act for the others, is a delivery to all. *Finchett v. How*, 2 Camp. 277. Thus, where an attorney

had been retained jointly by several persons to defend several suits against each, in the subject-matter of which they had a common interest, it was held that the delivery of a bill to one was sufficient to enable the plaintiff to maintain a joint action against all. *Oxenham v. Lemon*, 2 D. & Ry. 461. Some of the above decisions were under the repealed statute, but they seem to be still applicable, as the wording of the two is very similar; for by the 2 Geo. 2, c. 23, s. 23, the bill is to be "delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode."

Delivery of the bill, how proved.] As to proof of delivery of bill, by indorsement made on a copy by a deceased clerk in the ordinary course of his business, see *Champneys v. Peck*, 1 Stark. 404, and other cases cited *ante*, p. 57, *et seq.* As to evidence of sending bill by post, see *Skilbeck v. Garbett*, 7 Q. B. 846, and other cases cited *ante*, pp. 350, 351.

Delivery of the bill, at what time.] The bill must be proved to have been delivered one calendar month before the commencement of the action; 6 & 7 Vict. c. 73, ss. 37 and 48. See *Ryalls v. The Queen*, 11 Q. B. 781. The month must have been reckoned exclusively of the days on which the bill is delivered and action brought. See *Blunt v. Heslop*, 8 Ad. & E. 577; and *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226. In calculating the calendar month, the days of the calendar furnish the only guide to follow; *e.g.*, if the bill be delivered on the 28th day of one month, the action may be commenced on the 29th day of the following month, without regard to the length of the month. S. C.

The commencement of the action is determined by the date of the issuing of the writ of summons (Rules, 1883, O. ii., r. 1); and as this date appears on the statement of claim (see Rules, 1883, Forms, App. C.), the plaintiff need now give no further evidence of when he began the action, in order to show it is not premature.

Proof, and form of the bill.] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. *Anderson v. May*, 2 B. & P. 237; *Colling v. Treweek*, 6 B. & C. 394. But, it is not now necessary in the first instance for the plaintiff to prove the contents; it is enough to prove that a bill of fees, &c., subscribed or inclosed in a signed letter, was duly delivered, and the defendant may show that it was not a *bond fide* compliance with the act. See 6 & 7 Vict. c. 73, s. 37, *ante*, p. 450. The act does not prescribe any form of making out the bill, as 2 Geo. 2, c. 23, s. 23, did. See *Reynolds v. Caswell*, 4 Taunt. 193, on the old act. And this has not been sufficiently attended to in cases decided since the last act, in which the courts have been influenced too much by the strict requirements of the old one. Thus, it has been held that the bill must still show in what court the business was done; *Engleheart v. Moore*, 15 M. & W. 548; *Martindale v. Falkner*, 2 C. B. 706; but, it is sufficient if the court appear by reasonable inference; *Martindale v. Falkner*, *supra*; *Sargent v. Gannon*, 7 C. B. 742. It has, however, been decided that, the authority to tax, and the scale in all the superior courts of law being the same, it was *prima facie* enough if it appeared to be business done in any of those courts, and that the defendant ought to have applied for a better bill, if it were *bond fide* necessary; *Cozens v. Graham*, 12 C. B. 398; 21 L. J., C. P. 206; *Cook v. Gillard*, 1 E. & B. 26; 22 L. J., Q. B. 90; and the cases *contra*, decided shortly after the passing of the present act, must not be relied on. And, if the cause is sufficiently described to be understood, the technical title need not appear. *Anderson v. Boynton*, 13 Q. B. 308. The bill must show, either by the heading, or by the accompanying letter or

envelope, the party charged. *Taylor v. Hodgson*, 3 D. & L. 115; *Lucas v. Roberts*, 11 Exch. 41; 24 L. J., Ex. 227; *Gridley v. Austen*, 16 Q. B. 504; *Champ v. Stokes*, 6 H. & N. 683; 30 L. J., Ex. 242. A mistake in the date of the items, which does not mislead, will not vitiate the bill. *Williams v. Barber*, 4 Taunt. 806. So, a mistake in the name of the parties to the cause at the head of the bill, if not of a nature to mislead, or if the right name appears indorsed. *Sargent v. Gannon*, *ante*, p. 453. If part of the business was done in a court named in the bill, and part in an unnamed one, it has been considered that the plaintiff cannot recover any part. *Ivimey v. Marks*, 16 M. & W. 843; *Dimes v. Wright*, 8 C. B. 831. But, this is the rule, only where there is not enough in the bill to show on what scale the costs should be taxed; and where a part of the business appeared to have been done in an unnamed superior court of law, but the bulk of it in a named court of law at Westminster, this was held enough. *Keene v. Ward*, 13 Q. B. 515. The reasoning of the Q. B., in S. C., and *Cook v. Gillard*, *ante*, p. 453, seems to impugn the doctrine of *Ivimey v. Marks*, and *Dimes v. Wright*, *supra*, that a bill insufficient for part is bad altogether; which is, however, supported in *Pigot v. Cadman*, 1 H. & N. 837; 26 L. J., Ex. 134. On the other hand, *Cook v. Gillard*, *ante*, p. 453, and *Keene v. Ward*, *supra*, are adhered to, and the cases in the Exchequer dissented from, in *Haigh v. Ousey*, 7 E. & B. 578; 26 L. J., Q. B. 217. And the Q. B. point out that the C. P. had expressly decided in *Waller v. Lacy*, 1 M. & Gr. 54, that an attorney may recover for such of the items of his bill as are sufficiently described, although, as to others, the bill is insufficient. Where the solicitor A. who did the work assigned his business and debts to B., it was held that a bill signed by B. was sufficient to entitle him to sue. *Penley v. Anstruther*, 52 L. J., Ch. 367.

Defence.

Non-delivery of bill.] The defence of non-delivery of a bill must be specially pleaded. *Lane v. Glenny*, 7 Ad. & E. 83; see Rules, 1883, O. xix., r. 15, *ante*, p. 283. Proof that the bill was delivered to a servant of the defendant at his house is *prima facie* evidence of delivery to the defendant. *M'Gregor v. Keily*, 3 Exch. 794. In the absence of the defence, the solicitor may prove and recover a specific sum agreed to be paid. *Scarth v. Rutland*, L. R., 1 C. P. 642.

Disputed charges.] Where a bill has been delivered containing taxable items (and almost all items are so now), it has been held, under the old act, that the defendant cannot object to the reasonableness of the charges at the trial. *Williams v. Frith*, 1 Doug. 198; *Anderson v. May*, 2 B. & P. 237; *Lee v. Wilson*, 2 Chitty, 65. The reason seems to have been that the defendant might have had them taxed by more competent persons than a jury, and must therefore be taken to have acquiesced in them conclusively. But by the present act (6 & 7 Vict. c. 73, s. 37) it is only after a verdict or writ of inquiry, or the expiration of one year from the delivery of the bill, that the reference to taxation at the request of the party chargeable is not grantable of course; and in point of practice a verdict is almost always taken subject, to the amount, to taxation by the proper officer. It seems, however, that as the plaintiff is not entitled as of right to have the amount so ascertained. *Ex parte Ditton*, 13 Ch. D. 318, C. A.

The delivery of a former bill is conclusive against an increase of charge on any of the same items contained in a subsequent bill for the same business, and strong presumptive evidence against any additional items; but real errors or omissions are to be allowed for. *Loveridge v. Botham*, 1 B. &

P. 49. Where the bill had been taxed previously to the signed bill being delivered, the master's *allocatur* was not conclusive against the plaintiff on a plea of *nunquam indebitatus*, but only strong evidence that no more is due; *Beck v. Cleaver*, 9 Dowl. 111; there the difference of amount depended on when the retainer of the plaintiff was revoked. It is a good defence that the plaintiff undertook the cause *gratis*; and the declaration of his clerk to that effect, when he attended to tax costs, is evidence for the defendant. *Ashford v. Price*, 3 Stark. 185. The stat. 33 & 34 Vict. c. 28, ss. 4, 11, do not require that an agreement with the client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," should be in writing. *Jennings v. Johnson*, L. R., 8 C. P. 425. If a solicitor undertake to charge a client only costs out of pocket, "in case the damages or costs should not be recoverable," and the client recovers, but the defendant becomes insolvent, the solicitor is not limited to costs out of pocket. *In re Stretton*, 14 M. & W. 806. The plaintiff is *prima facie* entitled to be paid for professional services; but, where the defendant proves facts which are evidence of gratuitous services, the jury ought not to be told "to find for the plaintiff unless the defendant has established his defence," but should be asked whether, taking all the evidence together, the plaintiff has proved his title to payment; for the onus of proof lies on him, and if the matter is made doubtful in their minds by the evidence, they ought to find for the defendant. *Hingston v. Kelly*, 18 L. J., Ex. 360.

Negligence or misconduct of plaintiff.] The plaintiff's negligence in the conduct of the business cannot be set up as a defence, if it has not been such as to deprive the defendant of all benefit; *Templer v. McLachlan*, 2 N. R. 136; but where such has been the case, as where the defendant's appeal against the removal of a pauper wholly failed from the plaintiff going to the wrong sessions and wrongly signing the notices himself, the plaintiff cannot recover; *Huntley v. Bulwer*, 6 N. C. 111; and if a solicitor conducting a suit commits an act of negligence by which all the previous steps become useless in the result, he can recover for no part of his business; *Bracey v. Carter*, 12 Ad. & E. 373. So, where an indictment for perjury failed for misnomer of the commissioner before whom it was committed, and the jury found gross negligence, the plaintiff cannot recover; *Lewis v. Samuel*, 8 Q. B. 685; even though the client was only to pay costs out of pocket, which was all the plaintiff sought to recover; S. C. A solicitor cannot recover costs of suit in an inferior court, which, as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition. See *Robinson v. Emanuel*, L. R., 9 C. P. 415, 416. So, if a solicitor sues in a court which is without adequate powers to examine material witnesses out of the jurisdiction, and the suit fails accordingly, he cannot recover his costs of the suit; but he may recover the costs of letters before suit demanding the debt. *Cox v. Leach*, 1 C. B., N. S. 617; 26 L. J., C. P. 125. So, where a solicitor commences an action on two foreign bills, without having first ascertained whether they had been specially indorsed to his client, which the solicitor knew was necessary by the foreign law, and the action is discontinued for want of such indorsement, he can recover no costs. *Long v. Orot*, 18 C. B. 610; 26 L. J., C. P. 127. If a solicitor, through inadvertence or inexperience, does useless work, he cannot recover anything for it. *Hill v. Featherstonhaugh*, 7 Bing. 569. And, entire items for useless work may be expunged. *Shaw v. Arden*, 9 Bing. 287. But, if there are other causes conducing to the loss of the benefit besides the plaintiff's negligence, the negligence is no defence. *Dax v. Ward*, 1 Stark. 409. It was no defence to an action for business done in defending a suit, that the plaintiff

was instructed to put in a plea for delay, which he neglected to do. *Johnson v. Alston*, 1 Camp. 176. Nor, that the plaintiff refused to go on with a suit in Chancery, if the defendant did not supply him with money; *Rowson v. Earle*, M. & M. 538; for though a solicitor cannot suddenly and without notice abandon a cause, yet if he gives reasonable notice, he is at liberty to discontinue the conduct of it, on the refusal by the client to supply him with money; and he may recover for the work done; *Vansandau v. Browne*, 9 Bing. 402. Where a solicitor prepares for a client a document which turns out to be illegal, but with regard to the legality of which there was reasonable doubt, he is entitled to recover for preparing it. *Potts v. Sparrow*, 6 C. & P. 749. The illegality must at all events be pleaded; *S. C.*, 1 N. C. 594; unless it makes the work done wholly useless; *semb. Tabram v. Warren*, 1 Tyr. & Gr. 153; *Roberts v. Barber, Chitty, Preced. by Pearson*, p. 225. So, the misinterpretation of a rule or order (such as a standing order of the House of Lords, by a solicitor acting as a parliamentary agent), the construction of which is doubtful, is not such culpable negligence as to disentitle the plaintiff to recover for his work, although in consequence of the mistake the bill is withdrawn. *Bulmer v. Gilman*, 4 M. & Gr. 108; see also *In re Sadd*, 34 Beav. 650; 34 L. J., Ch. 562. It is a good defence, that the plaintiff paid no attention to the defendant's case, but resided at a distance from the place where his business was carried on, and that, in fact, it was transacted there by another person employed by the plaintiff; *Taylor v. Glassbrook*, 3 Stark. 75; *Hopkinson v. Smith*, 1 Bing. 13; and this was ruled without reference to the success or miscarriage of the business done.

The plaintiff's negligence may now in any case be set up as a counter-claim *pro tanto* under Rules, 1883, O. xix., r. 3.

Want of certificate, admission, &c.] The defendant may put the plaintiff to prove, under a special defence, that the plaintiff had a certificate, *vide ante*, pp. 449, 450; or was duly admitted. *Hill v. Sydney*, 7 Ad. & E. 956. By the 23 & 24 Vict. c. 127, s. 22, the Law List, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of solicitors who have obtained stamped certificates for the current year (from 16th November or any later day to 15th November in the next year), on or before the 1st of January in the same year, shall, until the contrary be made to appear, be evidence in all courts, &c., that the persons named in it as such solicitors are so certificated; and the absence of the name of any person from the List shall be *prima facie* evidence that he is not so qualified to practise as a solicitor under a certificate for the current year; but in the latter case an extract from the Roll of Attorneys under the hand of the registrar for the time being (or of the secretary of the Law Society, while that society acts as registrar) shall be evidence of the facts appearing in the extract. See J. Act, 1875, s. 14.

Agency business.] Where one solicitor does business for another, the solicitor who does the business universally gives credit to the solicitor who employs him, and not to the client for whose benefit it is done. If the solicitor in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client. *Per cur.*, *Scrace v. Whittington*, 2 B. & C. 13. But such notice, though it may protect the solicitor from liability, will not necessarily make the client liable. See *Robbins v. Fennell*, 11 Q. B. 248, 256; *Robbins v. Heath*, *Id.* 257, n.; and *Peatfield v. Barlow*, L. R., 8 Eq. 61.

Statute of Limitations.] The contract to conduct a suit is entire and can only be determined on reasonable notice that the solicitor will not proceed

without payment or advances from the client ; and where the suit ended within six years the Statute of Limitations will not bar the demand for any part of the business ; *Harris v. Osbourn*, 2 Cr. & M. 629 ; *Martindale v. Falkner*, 2 C. B. 706 ; *Harris v. Quine*, L. R., 4 Q. B. 653 ; for the solicitor cannot in general sue for his costs until the suit is ended or his client dead, and the statute does not run till the happening of one of those events. *Whitehead v. Lord*, 7 Exch. 691 ; 21 L. J., Ex. 239.

ACTION AGAINST SOLICITOR FOR NEGLIGENCE.

What amounts to actionable negligence.] An error of judgment on a point of law, open to reasonable doubt, is not sufficient ; *Kemp v. Burt*, 4 B. & Ad. 424 ; there must be gross ignorance or gross negligence in the performance of his professional duties ; *Purves v. Landell*, 12 Cl. & F. 91. The solicitor is bound to bring a fair amount of skill, care and knowledge to the performance of his duty, and this will be a question of fact for the jury under the direction of the judge, who will explain the nature of the duty, and the degree of negligence which makes him responsible. *Hunter v. Caldwell*, 10 Q. B. 69, 83, Ex. Ch.

The omission to take the proper steps for renewing a writ, issued to save the Statute of Limitations, was held to be actionable negligence. S. C. Where a mortgage was prepared under the defendant's advice, and the solvency of the mortgagor was questionable to the knowledge of the attorney, it was held his duty to search at the Insolvent Debtors Court ; and if the language of the defendant shows that he considered his search expedient, this is evidence of his suspicions ; *Cooper v. Stephenson*, 21 L. J., Q. B. 292 ; but the court declined to say whether or not searches of this kind are necessarily, and in all cases, essential ; *Ibid.* See also *Langdon v. Godfrey*, 4 F. & F. 445. It may not be part of the duty of a solicitor to know the legal operation of conveyances, but it is his duty to take care not to draw wrong conclusions from deeds before him, but to lay them before counsel, or draw the conclusions at his own peril ; and therefore where a solicitor acted on the advice of counsel to whom he had mis-stated the legal effects of certain deeds which did not accompany the case, this was held evidence for the jury of negligence for which he was responsible. *Ireson v. Pearman*, 3 B. & C. 799.

A solicitor instructed to take or to defend legal proceedings is liable for failure by reason of his own culpable neglect ; as, where he was retained to proceed on a statute against an apprentice, and he proceeded under a wrong section of the statute as against a servant ; *Hart v. Frame*, 6 Cl. & F. 193 ; or, where the solicitor and his witnesses were absent when a cause was called on ; and the counsel had a brief and was present, and was obliged to withdraw the record ; *Hawkins v. Harwood*, 4 Exch. 503 ; or, where he sued in an inferior court, which as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition ; see *Robinson v. Emanuel*, L. R., 9 C. P. 415, 416.

There are numerous other cases on this subject, and they establish, in general, that a solicitor is liable for the consequence of ignorance or non-observance of the rules of practice of the court in which he sues ; for the want of care in the preparation of the cause for trial ; or of attendance thereon with his witnesses ; and for the mismanagement of so much of the conduct of a cause as is usually allotted to solicitors. But he is not answerable for

error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually intrusted to counsel. His liability must, however, depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting counsel where the law would presume him to have the knowledge himself. *Godefroy v. Dalton*, 6 Bing. 467-9, *per cur.* See *Lee v. Walker*, L. R., 7 C. P. 121.

A solicitor will be liable to an action, at least for nominal damages, for compromising an action against the express directions of his client, though the compromise be really for the benefit of the client; *Butler v. Knight*, L. R., 2 Ex. 109; and, under such circumstances, it is no defence that the solicitor acted under the advice of counsel retained to conduct the cause; *Fray v. Voules*, 1 E. & E. 839; 28 L. J., Q. B. 232. A solicitor retained in an action has no implied authority after judgment in favour of his client, to agree on his behalf to postpone execution. *Lovegrove v. White*, L. R., 6 Q. P. 440. And, in accordance with the rule of Equity, it seems doubtful whether a solicitor has now any authority to compromise an action without the consent of his client. *Vide ante*, p. 262; and *confer*, *Grant v. Holland*, 3 C. P. D. 180.

Where the money of a client comes into the hands of a partner in a firm of solicitors in the ordinary course of their business as solicitors, the firm are liable to make good any loss occasioned by the partner's defalcation. *St. Aubyn v. Smart*, L. R., 5 Eq. 183; L. R., 3 Ch. 646; *Dundonald, El. of, v. Masterman*, L. R., 7 Eq. 504. So in the case of negotiable bonds of the client; *Cleather v. Twisden*, 24 Ch. D. 731. A sum of money received to be invested on a specific mortgage falls within this rule; *Harman v. Johnson*, 2 E. & B. 61; 22 L. J., Q. B. 297; but, not a sum left to be invested on mortgage generally, for this is the business of a scrivener, and does not fall within the province of a solicitor merely as such. *S. C. Plumer v. Gregory*, L. R., 18 Eq. 621. Nor, are the firm liable for money received by a partner *quâ* trustee. *Dundonald, El. of, v. Masterman, supra*.

A solicitor when making a special agreement under the Attorneys and Solicitors' Act, 1870 (*ante*, p. 451), with reference to his fees, cannot stipulate that he shall not be liable for negligence, as such condition is by sect. 7 wholly void.

Damages.] This action is maintainable, though the damages be only nominal; *Godefroy v. Jay*, 7 Bing. 413, adopting the rule in *Marzetti v. Williams*, 1 B. & Ad. 415; *Fray v. Voules, supra*; and where the plaintiff shows that the solicitor has been guilty of negligence, as by letting judgment go by default in an action which he was retained to defend for the plaintiff, it is for the defendant (the solicitor) to show that the plaintiff had no defence in that action, and not for the plaintiff to begin by showing he had a good defence, and so had been damaged by the judgment by default. *Godefroy v. Jay, supra*. See also *Whiteman v. Hawkins*, 4 C. P. D. 13. As to damages where the solicitor has compromised the action contrary to his client's instructions; *Butler v. Knight*, L. R., *supra*; and where he has improperly sold his client's land under a power of sale; *Cockburn v. Edwards*, 16 Ch. D. 393.

Defence.

Statute of Limitations.] As the action can be maintained without showing special damage (*supra*), it follows that the Statute of Limitations runs from the breach of duty complained of; *Howell v. Young*, 5 B. & C. 259; and not

from the first discovery of the default ; S. C., *Short v. M'Carthy*, 3 B. & A. 626 ; nor, from the occurrence of the consequential damage ; S. CC. ; *Smith v. Fox*, 6 Hare, 386 ; nor, is the remedy kept alive by the defendant's admission of his responsibility within six years ; *Short v. M'Carthy*, *supra*.

ACTION BY SURGEONS OR OTHER MEDICAL PRACTITIONERS.

The following are the statutes which relate to the qualifications of medical practitioners, and their capacity to sue.

Under the Apothecaries Act (55 Geo. 3, c. 194), s. 21, no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial, that he has obtained a certificate from the Court of Examiners of the Apothecaries Company.

The Medical Act, 1858 (21 & 22 Vict. c. 90, amended in a few particulars by the 22 Vict. c. 21, and the 23 Vict. c. 7), provides for the formation of a general "medical register" of all persons qualified to practise in medicine or surgery ; and (sect. 31) a person so registered is entitled to practise medicine or surgery, or both, according to his qualifications, in any part of the Queen's dominions, and to demand and recover in any court of law, with "full costs of suit," reasonable charges for professional aid, advice and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied to patients. By sect. 32 "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this act."

By sect. 27, the registrar of the general council, formed under the act, shall yearly cause to be printed and published, under the direction of the council, a register of the names and residences of all persons entitled to be registered under it and appearing in it on the 1st January in each year, with their medical titles, diplomas, and qualifications, &c. ; and a copy of this "medical register" for the time being *purporting* to be so printed and published shall be evidence in all courts, and before all justices and others, that the persons therein specified are registered according to the act ; and the absence of the name of any person from such a copy shall be evidence, until the contrary appear, that he is not registered. Provided that in the case of a name not in the copy of the register, a certified copy under the hand of the registrar of the general council, or of any branch council, of the entry of the name on the general or local register, shall be evidence of registration. As to the form of register, see *Pedgrift v. Chevallier*, 8 C. B., N. S. 240 ; 29 L. J., M. C. 225.

By sect. 55, the act does not extend to prejudice or affect the lawful occupation, trade, or business of chemist and druggist, and dentist, so far as the same extend to selling, compounding, or dispensing medicines. But if a chemist prescribe he must show registration, as sect. 55 exempts chemists only so far as selling, compounding, and dispensing medicine. See *Apothecaries Co. v. Greenough*, 1 Q. B. 799.

The language of the Medical Act, 1858, s. 32, resembles that of the Apothecaries Act, 55 Geo. 3, c. 194, s. 21 (*supra*), under which act many of the following cases were decided. Proof of qualification is a condition precedent to recovery, but the want of qualification must now be specially

pleaded. See Rules, 1883, O. xix., rr. 15, 20, *ante*, pp. 283, 284. The provisions above as to proof of registration are probably only cumulative, and plaintiff may prove it by production of a "local register," or, *ut sembl.*, by an examined copy, or by a copy certified as in the case of public books under 14 & 15 Vict. c. 99, s. 14. See *ante*, pp. 92, 96. The qualification of an apothecary may be proved by certificate under 14 & 15 Vict. c. 99, s. 8, *ante*, p. 95. The identity of the plaintiff and the person named in the register will be presumed. *Simpson v. Dismore*, 9 M. & W. 47. The register only shows registration down to the preceding January, but the plaintiff's continuance on the register will probably be presumed, in conformity with the ordinary presumption of things, remaining *in statu quo*; *ante*, p. 33. To entitle the plaintiff to recover for services and medicines supplied, he must have had the necessary qualification, and be registered in respect thereof, at the time the services were rendered and the medicines supplied. *Leman v. Houseley*, L. R., 10 Q. B. 66; dissenting from *Turner v. Reynall*, 14 C. B., N. S. 328; 32 L. J., C. P. 164; in which case the provisions of the Apothecaries Act, s. 21, *ante*, p. 459, seem to have been overlooked; see *per Blackburn, J.*, L. R., 10 Q. B. 69. If two medical practitioners are in partnership, and one is duly registered, but the other not, they can jointly maintain an action for medical services by the firm; *per Erle, C. J.*, and *Byles, J.*, in *Turner v. Reynall*, *supra*.

Sect. 31 only enables persons registered to practise medicine or surgery "according to their qualifications;" hence, where the plaintiff's qualification is to practise surgery only, he cannot recover for attendance in a medical case, for he is not within the section, and is prohibited from recovering by the Apothecaries Act, s. 21 (*ante*, p. 459). *Allison v. Haydon*, 4 Bing. 619; *Leman v. Fletcher*, L. R., 8 Q. B. 319. He might, however, recover for medicine administered as ancillary to a surgical case; *vide* S. CC. See also on this section, *per Bramwell, B.*, *Ellis v. Kelly*, 6 H. & N. 226; better, 30 L. J., M. C. 35, 37. Sect. 32 is not confined in its operation to actions against the patients themselves, but extends to a case where a third person has guaranteed payment for medical attendance, etc., or is primarily liable for it, as supplied on his credit. So, a medical practitioner, engaged by another to attend his patients in his absence, cannot recover the price of his services without proof of registration; *De la Rosa v. Prieto*, 16 C. B., N. S. 578; 33 L. J., C. P. 262; but *semble*, that an unregistered assistant may recover his salary from a registered practitioner; *per cur.* S. C. The act applies to medical attendance given on board a foreign man-of-war in an English port. S. C. By sect. 46, the general council may dispense with the provisions of the act, or its own regulations, in favour of certain persons practising before the act passed. A resident physician or medical officer of an hospital solely for foreigners (not being a British subject) is not affected by the act if he has a foreign degree or diploma of M.D., and has passed such examination as entitles him to practise in his own country, and is in no other medical practice except as such resident officer; 22 Vict. c. 21, s. 6.

By the Dentists' Act, 1878, (41 & 42 Vict. c. 33), s. 5, a person registered under that act may practise dental surgery; and no person who is not registered under that act, or is a legally qualified medical practitioner, is entitled to recover any fee for any dental operation, attendance, or advice. As to evidence of registration, see sect. 29.

By the Veterinary Surgeons' Act, 1881, (44 & 45 Vict. c. 62), s. 17, (2) no person not for the time being on the register of veterinary surgeons, or who on the 27th August, 1881, held the veterinary certificate of the Highland and Agricultural Society of Scotland, shall be entitled after 31st December, 1883, to recover any fee for performing any veterinary operation or for giving attendance or advice.

The superintendent of a station of a railway company cannot, as such, and without express authority, make the company liable for a surgeon's bill for attendance on a person injured by an accident on the railway; *Cox v. Midland Counties Ry. Co.*, 3 Exch. 268; but the general manager of a railway has, incidental to his employment, authority to bind the company to pay for surgical attendance bestowed at his request on a servant of the company injured by an accident on their railway. *Walker v. Gt. W. Ry. Co.*, L. R., 2 Ex. 228.

Defence.

If the defendant has received no benefit, in consequence of the plaintiff's want of skill, the latter cannot recover. *Kannen v. M'Mullen*. Peake, 59; *Duffit v. James*, cited 7 East, 480. But the remuneration of a practitioner who has used due skill and diligence does not depend on his effecting a cure. In the case of a surgeon, if an operation which might have been useful has failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he has no claim; *per Alderson, J.*, in *Hill v. Featherstonhaugh*, 7 Bing. 574.

Physicians' Fees.

At common law, a physician could maintain no action for his fees; *Chorley v. Bolcot*, 4 T. R. 317; nor for travelling expenses; *Veitch v. Russell*, 3 Q. B. 928; unless there was a special contract proved by unambiguous evidence, and not by mere letters acknowledging a "debt" or an "account," in vague general terms; S. C.; *Att.-Gen. v. R. College of Physicians*, *infra*; or unless he had rendered services as a surgeon. *Battersby v. Lawrence*, Car. & M. 277. But the Medical Act, 1858, s. 31, (*ante*, p. 460), gives a general right of action to all registered medical practitioners; and a physician, if registered, may now sue without proof of any express contract or implied understanding with the patient that he should be paid. *Gibbon v. Budd*, 2 H. & C. 92; 32 L. J., Ex. 182. But, by that section any college of physicians in the United Kingdom, may make a bye-law that their fellows or members shall not sue for their fees; and if they do, the bye-law may be pleaded in bar. The Royal College of Physicians has passed a bye-law that no Fellow of the College shall be entitled to sue; but this does not include members. *Vide* S. C. That College can grant licences without restricting their licentiates from compounding and selling the medicine they prescribe. *Att.-Gen. v. R. College of Physicians*, 1 J. & H. 561; 30 L. J., Ch. 757.

ACTION FOR WAGES AND WRONGFUL DISMISSAL.

In an action by a servant for his wages the plaintiff must prove a hiring, of which service will be evidence, the length of time of service, and the amount of wages due.

An indefinite hiring in the case of servants, without mention of time, is presumably a hiring for a year. *Lilley v. Elwin*, 11 Q. B. 742; *Turner v. Robinson*, *post*, p. 462. The fact that the wages are payable monthly makes no difference. And if, during the year, the master dismisses his servant

without cause, the latter is entitled, as damages, to his wages until the end of the year. *Beeston v. Collyer*, 4 Bing. 309; *Fawcett v. Cash*, 5 B. & Ad. 904. See, however, as to damages, *post*, p. 465. If the servant leave his service during the year without good cause he cannot recover any of the current wages; *Huttman v. Boulnois*, 2 C. & P. 510. So, if he is discharged for good cause during the year, either by his master or a magistrate's order. *Lilley v. Elwin*, *ante*, p. 461; *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171. Even though the master has recovered damages against him for the misconduct. *Turner v. Robinson*, 5 B. & Ad. 789. So, if the servant die during the year. *Plymouth v. Throgmorton*, 1 Salk. 65. But, where S. was employed as consulting engineer, at 500*l.* payable in equal quarterly instalments, for 15 months, to complete certain works, and died after two instalments became due, but before the work was finished, his administrator was held entitled to recover the two instalments. *Stubbs v. Holywell Ry. Co.*, L. R., 2 Ex. 311. The rule that an indefinite hiring is to be taken as a yearly one is not a rule of law; but the jury are to say what the terms of hiring were, judging from the circumstances of the case, including evidence, if any, of usage; thus, on an indefinite hiring at certain weekly wages, the jury may infer that the hiring is weekly. *Baxter v. Nurse*, 6 M. & Gr. 935. So, a hiring at "2*l.* 2*s.* a week for one year," *Robertson v. Jenner*, 15 L. T., N. S. 514, *Bramwell v. B.*; or at "2*l.* a week and a house," *Evans v. Roe*, L. R., 7 C. P. 138; is a hiring by the week and not by the year. See also *R. v. Droitwich*, 3 M. & S. 243; and where there is such a written contract, oral evidence that, at the time it was signed, it was intended to be a hiring for a year, is inadmissible. *Evans v. Roe*, *supra*. Where the plaintiff was engaged as a clerk at a yearly salary of 150*l.*, and was paid his wages weekly, and accepted a month's notice as determining his service; and afterwards re-entered the service at a salary of 250*l.*, and was paid weekly; it was held properly left to the jury to say, whether the last hiring was on the same terms as the first, and well determined by a month's notice. *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J., Ex. 459. In the case of the master of a ship, the hiring is not for a year certain, and requires reasonable notice to determine it. *Green v. Wright*, 1 C. P. D. 591. Questions may arise as to whether the hiring is even a weekly one. See *Warburton v. Heyworth*, 6 Q. B. D. 1, C. A.

With regard to a menial or domestic servant, there is a common understanding (except where a different custom is shown to prevail), though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages. *Beeston v. Collyer*, 4 Bing. 313, *per Gaselee, J.*; *Fawcett v. Cash*, 5 B. & Ad. 908; *Nowlan v. Ablett*, 2 C. M. & R. 54. In such cases, if the master without reasonable cause turns the servant away without notice, the latter would be enabled to recover a month's wages, beyond the arrears; *Robinson v. Hindman*, 3 Esp. 235; the claim must be for wrongful dismissal, and not for work and labour; *Fewings v. Tisdal*, 1 Exch. 295; recognising *Smith v. Hayward*, 7 Ad. & E. 544, and dissenting from *Eardly v. Price*, 2 N. R. 333; on this special claim the servant can only recover the month's wages, and not the wages down to the dismissal. *Hartley v. Harman*, 11 Ad. & E. 798.

The term menial servant within this rule includes a head gardener, though living in a separate house in his master's grounds; *Nowlan v. Ablett*, *supra*; *Johnson v. Blenkinsop*, 5 Jur. 870, T. T. 1841, Q. B.; so, a huntsman, although hired at yearly wages, with perquisites that cannot be fully realised till the end of the year. *Nicoll v. Greaves*, 17 C. B., N. S. 27; 33 L. J., C. P. 259. But does not include a governess. *Todd v. Kerrich or Kellage*, 8 Exch. 151; 22 L. J., Ex. 1.

Although a general hiring of an agent at a certain sum per annum,

simply, is a hiring for a year, yet a custom to discharge upon notice may be engrafted on such general hiring though the contract be in writing, if the terms are not inconsistent with the custom; and, they are not inconsistent where the hiring was at a yearly salary, stipulating for a gratuity at the end of a year on approval. *Misner v. Bolton*, 9 Exch. 518; 23 L. J., Ex. 130; *Parker v. Ibbetson*, 4 C. B., N. S. 348; 27 L. J., C. P. 236. The custom must be of some reasonable antiquity and standing, uniform and sufficiently notorious and well understood that people would make their contracts on the supposition that it exists. *Fozall v. International Land Credit Co.*, 16 L. T. N. S. 637, Byles, J. Whether a written contract excludes the custom, is for the judge, and not for the jury, to decide. *Parker v. Ibbetson*, *supra*. When, however, the hiring is expressly for a time certain, a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract. *Peters v. Staveley*, 15 L. T., N. S. 275; M. T. 1866, Q. B. In *Fairman v. Oakford*, *ante*, p. 462, Pollock, C. B., observed "that juries in London usually find that clerks are entitled to 3 months' notice." 29 L. J., Ex. 460. *Accord. Fozall v. International Land Credit Co.*, *supra*. In *Darke v. Grosvenor Hotel Co.*, Q. B., T. T., 1865, *ex. rel. editoris*, the court awarded the secretary of that public company 3 months' salary in lieu of notice. In the case of the employment of an advertising and canvassing agent, the jury found that a month's notice was sufficient. *Hiscox v. Batchellor*, 15 L. T., N. S. 543. It was in this case said to make no difference, whether the remuneration is by salary or commission; S. C. *Id. cor. Byles, J.* See, however, *Rhodes v. Forwood and Ex pte. Maclure*, cited *post*, p. 464. On the question of notice it may be material to consider whether there exist a contract of *service* between the parties. See on this point, *R. v. Negus*, L. R., 2 C. C. 34, and cases there cited. See also further, *sub. tit. Work as agents, post*, pp. 526, 527.

It has never been decided whether, on a hiring for a year without any express contract as to notice, if the service continue beyond the first year, either party can determine the contract at the end of the current year without notice, or whether a reasonable notice ought to be given previously. See *Beeston v. Collyer*, 4 Bing. 309. A contract "for one whole year, and so from year to year so long as the parties should respectively please," can only be determined at the end of a current year; *Williams v. Byrne*, 7 Ad. & E. 177; and *semble*, by reasonable notice; *Id.* 182. An agreement between master and servant, "to be binding between the parties for 12 months certain from the date, and to continue from time to time until 3 months' notice be given by either party," may be determined by 3 months' notice expiring at the end of the first year. *Brown v. Symons*, 8 C. B., N. S. 208; 29 L. J., C. P. 251. An agreement "for 12 months certain, after which time either party should be at liberty to terminate the agreement" by 3 months' notice, may be determined without notice at the end of the 12 months. *Langton v. Carleton*, L. R., 9 Ex. 57, *diss.* Kelly, C. B. *Sed quære*. An agreement of hiring for 6 months and "6 months' notice from either side to terminate the agreement," may be determined at any time after the expiration of the first 6 months. *Keon v. Hart*, I. R., 2 C. L. 138, C. P.; Ir. Ex. Ch. I. R., 3 C. L. 388; and see *Ryan v. Jenkinson*, 25 L. J., Q. B. 11.

Where the master has dispensed with the plaintiff's services before he has entered on the service, and has refused to abide by his contract, the servant may bring an action on the contract before the time for its commencement has arrived. *Hochster v. De La Tour*, 2 E. & B. 678; 22 L. J., Q. B. 455. *Accord. Frost v. Knight*, L. R., 7 Ex. 111, Ex. Ch. An offer by the plaintiff to serve is unnecessary; readiness and willingness to serve, which implies ability, is sufficient. *Wallis v. Warren*, 4 Exch. 361.

If a servant misconduct himself, the master may turn him away without

any warning. *Spain v. Arnott*, 2 Stark. 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, &c.) is a good ground of dismissal; *S. C.*; *Lilley v. Elwin*, 11 Q. B. 742; however reasonable or urgent the excuse for the servant's wilful absence may be. *Turner v. Mason*, 14 M. & W. 112. If a clerk wrongfully claim to be a partner, the master may dismiss him forthwith as clerk. *Amor v. Fearon*, 9 Ad. & E. 548. So, where a clerk disobeys a direction to apply remittances in a particular way; *Smith v. Thompson*, 8 C. B. 44; or, a traveller neglects immediately to remit sums collected, in accordance with the terms of his engagement; *Blenkarn v. Hodges' Distillery Co.*, 16 L. T., N. S. 608, Byles, J.; or sells his employer's goods (wines) to a brothel-keeper; *Id.*; or, where a servant embezzles, though his wages due exceed what he has embezzled. *Brown v. Croft*, 1 Chitty, Prac. of the Law, 82. The master is not bound to assign the cause at the time of the dismissal; and where good ground for dismissal existed at the time, it is immaterial whether or not it was the real cause. *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171. See *Spotswood v. Barrow*, 5 Exch. 110. Where the payment of wages was to be at the rate of 50*l.* per month, it was held that subsequent misconduct was no answer to an action for wages which had then accrued due, because there was a vested right to each month's wages, when the month had elapsed. *Taylor v. Laird*, 1 H. & N. 266; 25 L. J., Ex. 329; *Button v. Thompson*, L. R., 4 C. P. 330. This may, however, be altered by the terms of the hiring, as where the plaintiff was employed on the terms that he should give 14 days' notice, and if he left without notice should forfeit all wages due: the wages were ascertained on each Thursday up to that day, and paid on the following Saturday; the plaintiff worked on Friday and left without notice; held that he forfeited the wages earned up to Thursday as well as those subsequently. *Walsh v. Walley*, L. R., 9 Q. B. 367. Where a master, having a right to discharge his servant for misconduct, condones the act of misconduct and retains the servant, he cannot afterwards discharge him for the same act. *Phillips v. Fozall*, L. R., 7 Q. B. 680, per Blackburn, J.

The bankruptcy of the master is not a dissolution of the contract of hiring. *Thomas v. Williams*, 1 Ad. & E. 685. Dissolution of the partnership of the employers is not necessarily a breach of the contract of the firm to employ the plaintiff; at all events, if plaintiff entered into the service of the altered firm, this is evidence in proof of a defence of voluntary exoneration from the first contract before breach. *Hobson v. Cowley*, 27 L. J., Ex. 205. But, dissolution of partnership, has been held to be a breach of an agreement to teach a business, contained in an agreement of apprenticeship. *Couchman v. Sillar*, 22 L. T., N. S. 480, E. T. 1870, C. P.; see also *Eaton v. Western*, 9 Q. B. D. 636, C. A. If there be an agreement for service between the plaintiff and A. and B., then in partnership, the death of one of the partners puts an end to the contract, though the service was for a time certain; and no action can be maintained against the survivor for not employing the plaintiff. *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J., Ex. 207. But a voluntary parting with the business, is a breach of the contract to employ. *Stirling v. Maitland*, 5 B. & S. 840; 34 L. J., Q. B. 1. See *Cook v. Sherwood*, 3 F. & F. 729; 11 W. R. 595, C. P. E. T. 1863. But an agent or servant paid by commission on the profits of the business carried on, cannot sue his employer for giving up the business before the expiration of the term for which he was engaged; *Rhodes v. Forwood*, 1 Ap. Ca. 256, D. P.; nor for giving it up without notice. *Ex pte. Maclure*, L. R., 5 Ch. 737; *L. Leith, &c. Shipping Co. v. Ferguson*, 13 Sc. C. of Sess. Cases, 1850, p. 51.

In contracts for personal service it is an implied condition that the death

of either party shall dissolve the contract. *Farrow v. Wilson*, L. R., 4 C. P. 744. The plaintiff was hired as a farm bailiff, by A. at weekly wages, with a stipulation for 6 months' notice or 6 months' pay: it was held that the contract was dissolved by A.'s death, and that the stipulation as to notice did not apply. *Id.*

Where an apprenticeship is dissolved by the death of the master during the term, no part of the premium paid is recoverable from his executors; *Whincup v. Hughes*, L. R., 6 C. P. 78. In *Hirst v. Tolson*, 2 Mac. & G. 134; 19 L. J., Ch. 441, an articulated clerk was allowed to prove against the estate of his master, an attorney, who died during the articles, for the proportionate part of the premium the clerk had paid. *Sed quære*, for this decision was founded on an erroneous view of the rule at common law. See judgments in *Whincup v. Hughes*, *supra*. Incapacity in a servant from illness, arising after a contract for personal service, absolute in its terms, had been entered into, is an answer to an action for its breach. *Boast v. Firth*, L. R., 4 C. P. 1. So, in the case of a contract involving personal skill; as a pianoforte player. *Robinson v. Davison*, L. R., 6 Ex. 269. But, where from the circumstances it can be given, the employer is entitled to reasonable notice of such disability. S. C., *per* Brett, J., at N. P. *Id.* p. 271. Incapacity of the servant from sickness is not a determination of the contract, nor, will it justify dismissal without regular notice; *semble* *R. v. Wintersett*, Cald. 298. So, where a person entered into service as a brewer for a term certain at weekly wages, and became disabled by illness for several months, but afterwards was employed by the defendant as before,—held, that this involuntary inability did not suspend the right to wages; nor negative the allegation of readiness and willingness to serve. *Cuckson v. Stones*, 1 E. & E. 248; 28 L. J., Q. B. 25. But, permanent disability, such as paralysis, &c., would have justified putting an end to the contract; *per cur.* S. C. Total inability to perform his duty will not prevent a servant from recovering wages for the time he actually served, where the agreement is not for any specific term. *Bayley v. Rimmell*, 1 M. & W. 506. A seaman disabled in the course of his duty is entitled to wages for the whole voyage; *Chandler v. Grieves*, 2 H. Bl. 606, n. Inability to perform his duty by reason of incompetency or ignorance will justify the dismissal of an artificer, notwithstanding a contract for a term, where he was hired on the express representation that he had the requisite skill. *Harmer v. Cornelius*, 5 C. B., N. S. 236; 28 L. J., C. P. 85; and where a person is employed to do something requiring skill, there is an implied warranty that he possesses the requisite skill; *per curiam*, S. C. Where the contract of yearly service is determined by *consent* in the middle of a quarter, there is no necessarily implied contract to pay *pro rata*; but a jury may infer such an agreement from circumstances. *Lamburn v. Cruden*, 2 M. & Gr. 253; *Thomas v. Williams*, 1 Ad. & E. 685.

Where a contract of apprenticeship provides that the apprentice's father shall provide him with board and lodging, but is silent as to the place where the apprentice is to be taught, the master is bound to teach him at or near the place where the business was carried on, at the time the contract was executed. *Eaton v. Western*, 9 Q. B. D. 636, C. A. But, it seems it is otherwise where the apprentice resides in his master's house. *Id.* 641, *per* Hannen, P.; *Coventry v. Windal*, Brownl. 67.

As to agreements for service within the Stat. of Frauds, s. 4, see *post*, p. 468. See also the Employers & Workmen Act, 1875 (38 & 39 Vict. c. 90), as to the contracts to which that act applies.

Damages.] A dismissed servant may (and, if he can, ought to) enter into another service; *per cur.*, in *Hochster v. De la Tour*, 2 E. & B. 690; 22 L. J.,

Q. B. 458. He is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during such service. *Hartland v. General Exchange Bank*, 14 L. T., N. S. 863, Willes, J. See *Yelland's Case*, L. R., 4 Eq. 350; *Ex pte. Clarke*, L. R., 7 Eq., 550; and *Ex pte. Logan*, L. R., 9 Eq. 149. In *Gandell v. Pontigny*, 4 Camp. 375; 1 Stark. 198; where wages were payable quarterly, the clerk, who was tortiously discharged in the middle of the quarter, was allowed, on a tender of his services, to recover for the whole quarter. But this decision, which is inconsistent with those above cited, is not now followed. See *Smith v. Hayward*, 7 Ad. & E. 544; *Goodman v. Pocock*, 15 Q. B. 576; and 2 Smith's L. C., 8th ed., pp. 45, *et seq.*

Defence.

The defence of dismissal for misconduct must be specially pleaded; Rules, 1883, O. xix., r. 15, *ante*, p. 283.

It is a good defence that the servant has already recovered damages for wrongful dismissal from the service; for he cannot by subsequently tendering his services recover for a continued refusal to employ him throughout the original time of service; *Barnsley v. Taylor*, 37 L. J. Q. B. 39. See, however, *Unwin v. Clarke*, L. R., 1 Q. B. 417, 423, *per* Blackburn, J.

By the Merchant Shipping Act, 1854, ss. 2, 189, no person (except the master or pilot), engaged in any capacity on board ship, can in general sue in a superior court for his wages, where they do not amount to 50*l.*; but this defence must be specially pleaded. The term "claim for wages" in 31 and 32 Vict. c. 71, s. 3, (2), has been held to include a claim for wrongful dismissal. *The Blessing*, 3 P. D. 35. *Sed quære.*

ACTION FOR NOT ACCEPTING GOODS.

On a contract of sale of goods and chattels, the obligations of the seller are—1. To deliver, or preserve for delivery, to the buyer; 2. To perform warranties express or implied; 3. Neither wilfully to misrepresent nor fraudulently to conceal anything relating to the thing sold. The obligations of the buyer are—1. To accept the article sold; and 2. To pay the price. The precise time of the change and vesting of the property, and the risk of loss (*periculum rei venditæ*), are also questions incidental to this contract.

Though the price to be paid, may in part consist of an article to be given in exchange, the entire contract is in substance one of sale, and (except as to the form of claiming upon it) may be so treated. *Bach v. Owen*, 5 T. R. 409; Pothier, *Contrat de Vente*, par. 30. But, a mere exchange cannot be treated as a sale. *Harrison v. Luke*, 14 M. & W. 139. The subject of warranties has been already under consideration, *ante*, pp. 436, *et seq.* That of misrepresentation and fraud will be found *post*, sub. tit. *Defences to simple contracts—Fraud and Action for Deceit*. The remaining obligations, and the evidence relating to them, are the subject of this and the next following heads.

At common law, and independently of the Stat. of Frauds, a sale of personal property is good, though the bargain be oral. Blackstone thus lays down the common law (2 Comm. 447-8)—If the vendor names the price and the vendee agrees to give it, the bargain is struck, and neither is at liberty to be off, provided immediate possession be tendered; but if neither

the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods be delivered by way of earnest, the property of the goods is absolutely bound by it, and the vendee may recover the goods and the vendor the price. An examination of the authorities supports the statement of Blackstone. See *Shep. Touchst.* 224-5; the cases cited, *per cur.*, in *Thorpe v. Thorpe*, 1 Lutw. 252. The old authorities in 1 Reeves, Eng. L. 166; 3 *Id.* 372-4; Noy's Maxims, 87; *Bach v. Owen*, 5 T. R. 409, 410.

Several cases in Brook's Ab. (cited in 5 Vin. tit. Contract and agreement) throw light on the law of sales without writing. Thus, a mere oral agreement for sale, without paying or giving day of payment, is not a binding bargain; 1 Dyer, 30, pl. 203; 5 Vin. 506, pl. 4; *Id.* 509, pl. 3; but the contract binds if a future day for payment is fixed; *Id.* 510, pl. 4; so, if the buyer produces and begins to count the money; *Id. Ib.*, pl. 5; so, if he goes to fetch the money with consent of the seller; *Id. Ib.*, pl. 6.

It is observable, however, that the earlier dicta chiefly relate to simple oral sales for ready money, which supposed immediate performance on both sides, and in such cases neglect to perform on one side, released the other; but at the present time a contract for sale is good, although neither the money be paid or a day expressly named for payment. Kent (2 Comm. 492) says, that when the terms are agreed upon and bargain struck, and everything to be done by the seller is complete, "the contract becomes absolute without payment or delivery, and the property and risk of accident vest in the buyer." And it is now settled that, by a contract for the sale of specific ascertained goods the property immediately vests in the buyer and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. *Gilmour v. Supple*, 11 Moo. P. C. 551, 566; *Accord. Calcutta, &c. S. Navig. Co. v. De Mattos*, 32 L. J., Q. B. 322, 329, *per Blackburn, J.* See also *Simmons v. Swift*, 5 B. & C. 862, *per Bayley, J.*; *Tarling v. Baxter*, 6 B. & C. 360.

The doctrine, however, that the property is changed on the making of an effectual bargain, applies only to cases where the article sold is ascertained and *in esse* at the time; for if the bargain requires anything further to be done by the seller, as to make the article, or to set apart, or ascertain the price of the goods sold, by weight, number, measurement, selection, or otherwise, the property does not pass until they are in a state fit for delivery. Blackburn on Contract of sale, 152; *Gilmour v. Supple*, *supra*; *Jenner v. Smith*, L. R., 4 C. P. 270; 2 Kent Comm. 495, 496, 504. But, if it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the vendor before the goods are deliverable. Blackburn on Contract of Sale, 160; and see *Young v. Matthews*, L. R., 2 C. P. 127; *Turley v. Bates*, 2 H. & C. 200; S. C. *sub. nom. Furley v. Bates*, 33 L. J., Ex. 43. The cases on the vesting of property by sale are collected, *post*, p. 486, and *sub. tit. Action for conversion of goods*, where also will be found the cases on Lien and Stoppage *in transitu*. The subject of delivery is treated of under the heads of *Action for not delivering goods*, and *for goods sold and delivered*, *post*, pp. 489, 494, *et seq.*

Points often arise respecting the effect of a contract or negotiation relating to a sale, contained in a written correspondence. On this some cases have been already cited under a former head, *ante*, pp. 287, *et seq.* The rule is, that as soon as an offer by A. is accepted by B., in a letter duly posted and addressed by B. to A., the contract is complete, although the letter may not reach A. *Duncan v. Topham*, 8 C. B. 225; *Dunlop v. Higgins*, 1 H. L.

C. 381; S. C. 9 Sc. C. of Sess. Cases, 1847, p. 1407; *Harris's case*, L. R., 7 Ch. 587; *Household, &c. Insur. Co. v. Grant*, 4 Ex. D. 216, C. A., overruling, *British & American Telegraph Co. v. Colson*, L. R., 6 Ex. 108; see also 2 Ap. Ca. 692, *per* Ld. Blackburn. The acceptance must be unconditional in order to bind the party offering. *Chaplin v. Clarke*, 4 Exch. 403. If, therefore, the acceptance introduce any variation, there is no contract, unless there be evidence of assent by the other party to the alteration, either express or implied. Illustrations of this rule will be found in *Wontner v. Shairp*, 4 C. B. 404; *Duke v. Andrews*, 2 Exch. 290; *Cheveley v. Fuller*, 13 C. B. 122; *Hutton v. Upfill*, 2 H. L. C. 674; *Barker v. Allan*, 5 H. & N. 61; 29 L. J., Ex. 100; *Appleby v. Johnson*, L. R., 9 C. P. 158. See further on the making, accepting, and retraction of offers, cases cited *ante*, pp. 287, *et seq.* A tender to supply goods at specified prices, followed by an order for a specified quantity of such goods, constitutes a valid contract. *Gt. N. Ry. Co. v. Witham*, L. R., 9 C. P. 16. A mere mental assent to the terms of a proposed contract is not binding, but acting on those terms, may amount to evidence of the adoption of the contract. *Metropolitan Ry. Co. v. Brogden*, 2 Ap. Ca. 666, D. P. Where the contract is entered into by telegram, the sender is not liable for a mistake of the telegraph clerk in sending the message. *Henkel v. Pape*, L. R., 6 Ex. 7.

In an action for not accepting goods sold, the plaintiff may be put to proof of the contract, the performance of all conditions precedent on his part, the refusal to receive, and the amount of damage.

It is most commonly in an action for not accepting that the question as to the validity of contract of sale without writing arises, although it occurs in other actions, &c. The principal decisions on the Stat. of Frauds, so far as relates to contracts not to be performed within a year, and for the sale of goods and merchandise, therefore may be collected here.

The contract—Stat. of Frauds, s. 4.] By the Stat. of Frauds, 29 Car. 2, c. 3, s. 4, no action shall be brought whereby to charge any person "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Contracts within the Stat. of Frauds, s. 4.] Sect. 4 applies "to contracts the complete performance of which is of necessity extended beyond the space of a year." . . . "Where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that where the contract is such, that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply;" *per* Tindal, C. J., *Souch v. Strawbridge*, 2 C. B. 815; *Boydell v. Drummond*, 11 East, 142; *Knowlman v. Bluet*, L. R., 9 Ex. 1, 307, Ex. Ch., 1 Smith's Lead. Cas., notes to *Peter v. Compton*.

An agreement to serve for 70l. the first year, 90l. the second, and so on, is within the section, and requires a writing; and such writing cannot be explained by showing a contemporary or subsequent agreement to pay the salary quarterly. *Giraud v. Richmond*, 2 C. B. 835. An agreement by a company that E. "shall be the solicitor to the company," "and shall not be removed from his office except for misconduct," is within the section. *Eley v. Positive Assur. Co.*, 1 Ex. D. 20; affirm. on another ground, *Id.* 88, C. A. So, is an agreement that S. should not carry on a certain trade. *Davey v. Shannon*, 4 Ex. D. 81.

A contract for a year's service, to commence on a subsequent day, is within the section. *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Huntingfield, Ltd.*, 1 C. M. & R. 20; *Britain v. Rossiter*, 11 Q. B. D. 123, C. A.; unless perhaps, if the service is to begin on the next day. *Id.* 125; *Cawthorn v. Cordrey*, *infra*. The contract is within the statute, although the service is subject to be determined by a notice within the year. *Dobson v. Collis*, 1 H. & N. 81; 25 L. J., Ex. 267. A contract not enforceable, because of the statute, is an existing contract, and a fresh contract cannot be implied from acts done in pursuance of it. *Britain v. Rossiter*, *supra*; but, where A. orally agreed to serve B. for a year, the service to commence on a subsequent day; and A. entered upon the service upon the day named, and B. paid him wages on account; it was held that the jury might infer a new implied contract from that day. *Cawthorn v. Cordrey*, 13 C. B., N. S. 406; 32 L. J., C. P. 152.

The section applies only to contracts which are not to be performed on either side within the year. *Bracegirdle v. Heald*, *supra*; *Donellan v. Read*, 3 B. & Ad. 899. If all that is to be done by one party, as the consideration for the promise of the other, can be done within the year, it is not within the section. *S. C.*; *Smith v. Neale*, 2 C. B., N. S. 67; 26 L. J., C. P. 143.

The doctrine of part performance *vide ante*, p. 291, applies only to contracts relating to land. *Britain v. Rossiter*, *supra*. See also *Caton v. Caton*, L. R., 2 H. L. 136, 137.

Where in a contract, between the plaintiff and the defendant, one of several terms to be performed by the defendant falls within the section, the contract cannot be enforced; but if the entire work be done under the contract by the plaintiff, and accepted by the defendant, the plaintiff can recover on a *quantum meruit*, without before action electing to abandon the contract. *Savage v. Canning*, 1 C. L. 134, C. P.; following *Gray v. Hill*, Ry. & M. 420; and see *per cur.*, *Teal v. Auty*, 2 B. & B. 99; *Harman v. Reeve*, 18 C. B. 587; 25 L. J., C. P. 257. Where there was a contract for 24 numbers of a periodical work, to be delivered monthly at 21s. a number, it was held that the plaintiff might sue for the price of the numbers actually delivered, the defendant having refused to accept the remainder. *Mavor v. Pyne*, 3 Bing. 285. See *Knowlman v. Bluett*, L. R., 9 Ex. 1, 307, Ex. Ch.

The consideration must appear in the memorandum, at least by necessary inference. *Wain v. Warlters*, 5 East, 10. See further as to the sufficiency of the memorandum, *ante*, pp. 287, *et seq.*, and *post*, p. 475.

The contract.—Stat. of Frauds, s. 17.] By sect. 17 (sect. 16 in Stat. of the Realm), "no contract for the sale of any goods, wares, or merchandises for the price of 10l. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

Contracts within the Stat. of Frauds, s. 17.] Where the subject-matter of the contract did not exist *in esse*, and was therefore incapable of delivery and of part acceptance, at the time of the bargain, it was held not to be within the statute. *Groves v. Buck*, 3 M. & S. 178. But, now by *Ld. Tenterden's Act* (9 Geo. 4, c. 14), s. 7, the above provision of the Stat. of Frauds "shall extend to all contracts for the sale of goods of the value of 10l. sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be

actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery." The effect of this last act is to substitute the word "value" for "price" in the Stat. of Frauds, s. 17, and both acts are now construed together. *Scott v. E. Counties Ry. Co.*, 12 M. & W. 33, 38; *Harman v. Reeve*, *ante*, p. 469.

Executory contracts relating to goods *in esse*, are within the Stat. of Frauds, s. 17, and were so held before *Ld. Tenterden's Act*. *Rondeau v. Wyatt*, 2 H. Bl. 63. So, sales by auction are within the section. *Kenworthy v. Schofield*, 2 B. & C. 945. A sale of shares of a joint-stock banking company is not within sect. 17. *Humble v. Mitchell*, 11 Ad. & E. 205. Nor, of shares in a canal company. *Latham v. Barber*, 6 T. R. 76. Nor, of railway shares. *Bowlby v. Bell*, 3 C. B. 284; *Tempest v. Kilner*, 3 C. B. 249. Nor, of shares in a mining company. *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Ex. 53. Nor, is a sale or contract to deliver foreign stock, consisting of bonds and certificates. *Heseltine v. Siggers*, 1 Exch. 856; *see post*, p. 512. Sales of timber and growing crops, where they are not an "interest in land" within sect. 4, may be within sect. 17. See the cases cited *ante*, pp. 285, *et seq.*, and also the cases under the third exemption from the Stamp Act as to agreements, *ante*, p. 222. Trees lying felled are within sect. 17. *Acraman v. Morrice*, 8 C. B. 449. A contract for work and labour, as an agreement by a printer to print a book, although it involves finding materials, is not within sect. 17; *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237. But a contract to make a set of artificial teeth to fit the mouth of the employer is a contract for the sale of a chattel, and therefore within the section; *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252. If the substance of the contract be goods to be sold and delivered by the one party to the other, it is within the section. S. C.; *Atkinson v. Bell*, 8 B. & C. 277; *Grafton v. Armitage*, 2 C. B. 336. A sale is not less within the statute because it also includes an exchange; *Bach v. Owen*, 5 T. R. 409; or, a collateral agreement touching the thing sold; *Harman v. Reeve*, 18 C. B. 587; 25 L. J., C. P. 257. The plaintiff agreed to sell a horse to defendant, and to agist the horse sold, and also another horse of the defendant for a fixed time, and defendant was to pay 30*l.*; it was held, in an action for non-payment, that the contract was within sect. 17, the horse sold being shown to be of the value of 10*l.* S. C.

Acceptance and receipt within the Stat. of Frauds, s. 17.] Where goods above the value of 10*l.* have been sold; and there is no note or memorandum in writing, and no earnest has been given or payment made, then there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking to the possession as owner; *per cur. Phillips v. Bistolli*, 2 B. & C. 513. Acceptance without a delivery is insufficient, for the words are "accept and actually receive;" but the acceptance may be prior to the actual receipt, and need not be contemporaneous with or subsequent to it. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261; *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J., Ex. 159; *post*, p. 473; *Morton v. Tibbett*, 15 Q. B. 429; 19 L. J., Q. B. 382. Where the vendee ordered the goods to be marked while in the hands of the vendor's agent, and to be sent to a certain place, the sale was held to be insufficient without writing; *Bill v. Bament*, 9 M. & W. 36; and *see Saunders v. Topp*, 4 Exch. 390; for there can be no acceptance and receipt by the purchaser while the lien of the vendor remains, for the vendor's lien necessarily supposes that he retains possession of the goods. *Morton v. Tibbett*, *supra*; *Carter v. Toussaint*, *Baldey v. Parker*, and other cases, *post*, pp. 471, 472, *et seq.*

Bulk samples were sent to the vendee by coach, pursuant to the contract, but he returned them as not answering to the samples shown to him when he bought: the jury in an action for the price of the goods found that the samples *did* answer the contract: held that there was no acceptance. *Johnson v. Dodgson*, 2 M. & W. 653. It has been thought that there is not a sufficient acceptance so long as the buyer continues to have a right to object either to the quantity or the quality of the goods. *Hanson v. Armitage*, 5 B. & A. 559; *Smith v. Surman*, 9 B. & C. 561. This has, indeed, been directly denied, as a test in *Morton v. Tibbett*, *ante*, p. 470; while in *Hunt v. Hecht*, 8 Exch. 814, it was held that there is no acceptance (although there may be a receipt) unless the vendee has had an opportunity of judging whether the article corresponds with the order; and in *Smith v. Hudson*, *infra*, it was held that the acceptance must be made with the consent of the vendor. As an acceptance of a part, however small, of articles sold by a single oral contract lets in the oral terms of the entire bargain (*Elliott v. Thomas*, 3 M. & W. 170), it should seem that there certainly *may* be an acceptance without an opportunity of examining the whole; though the buyer may, of course, reject the residue if it does not correspond with the part received; for this he may do when the contract is a written one. See *Morton v. Tibbett*, *ante*, p. 470, and the judgment there; and see *Cunliffe v. Harrison*, 6 Exch. 903; 20 L. J., Ex. 325. There may be delivery to and acceptance of the goods by the vendee, so as to satisfy the statute, although it may still be open to him to dispute the terms of the contract as alleged by the vendor. *Tomkinson v. Staight*, 17 C. B. 697; 25 L. J., C. P. 85. And it would seem that though the purchaser has used more of the goods than (in the opinion of the jury) was necessary for the purpose of trying experiments to ascertain their quality, this does not necessarily amount to an acceptance. *Elliott v. Thomas*, *supra*; *Curtis v. Pugh*, 10 Q. B. 111.

Where the defendant bought of the plaintiff's agent 12 bushels of tares, part of a larger quantity in bulk, and the agent measured the 12 bushels and set them apart for the vendee to remain till called for, it was held that there was no acceptance. *Howe v. Palmer*, 3 B. & A. 321. So, where goods were sent by a vendor to a railway station, consigned to the order of the vendee, the property in the goods, whilst they were lying at the station waiting the order of the vendee, and before any order given or any other act done by him constituting an acceptance, was held not to pass to the vendee. *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145. So, where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, and about the expiration of that time A. rode the horse by way of trial, and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; these circumstances were held not to constitute an acceptance. *Tempest v. Fitzgerald*, 3 B. & A. 680. A horse was sold, and no time fixed for payment, and the horse was to remain with the vendors for 20 days without any charge to the vendee, at the expiration of which time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors: it was held that there was no acceptance, as the vendor's possession and lien still remained. *Carter v. Toussaint*, 5 B. & A. 855; *accord. Holmes v. Hoskins*, 9 Exch. 753. A delivery of goods to a wharfinger or agent, who has been accustomed to forward goods from the plaintiff to the defendant, and a delivery by him to the carrier, is not an acceptance, the carrier having no authority, though named by the vendee, to accept the goods for him, but only to receive them for the purpose of being carried. *Hanson v. Armitage*, 5 B. & A. 557; *Meredith v. Meigh* 2 E. & B. 364; 22 L. J., Q. B. 401. So, where goods, bought abroad, were de-

livered at a foreign port, on board a ship chartered by the purchaser, this was held to be no acceptance. *Acebal v. Levy*, 10 Bing. 376. So, where the purchaser appointed the mode in which the goods should be conveyed, and directed a third person, in whose possession the goods temporarily were, to see them delivered and measured and put up properly, and they were accordingly sent to another warehouse of the vendor, where the clerk gave an invoice to the purchaser, who did not pay for the goods, but the same day gave notice that he would not accept them, these circumstances were held not to amount to an acceptance. *Astley v. Emery*, 4 M. & S. 262. The same principle was recognised in the following case: A. went to the shop of B., and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon. Some A. marked, others were measured in his presence, and others he assisted in cutting from larger bulks. He then desired that an account of the whole might be sent to his house, and went away; a bill of parcels was accordingly sent, together with the goods, which A. refused to accept. It was held that this was all one contract, and therefore within the Stat. of Frauds, and that there was no acceptance and actual receipt. *Baldey v. Parker*, 2 B. & C. 37. "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." S. C., *Id.*, p. 44, *per* Holroyd, J., cited with approval, *per cur.*, in *Cusack v. Robinson*, 1 B. & S. 308; 30 L. J., Q. B. 264, *post*, p. 473. So, where a hogshead of wine in the warehouse of the London Dock Company was sold for 13*l.*, and a delivery order given to the vendee, but there was no assent on the part of the Dock Company to hold the wine as the agents of the vendee, it was held that there was no actual receipt within the statute. *Bentall v. Burn*, 3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119. Where A. employed B. to construct a waggon, and while it was in B.'s yard unfinished, A. employed a third person to fix upon it some iron work and a tilt, it was held that this did not amount to an acceptance; but *per* Tindal, C.J., it might perhaps have been otherwise, if these acts had been done after the waggon was completed. *Maberley v. Sheppard*, 10 Bing. 99. Where the goods were sent with an invoice, and the vendee declined to receive them of the carrier, who kept them for a month, and until the end of that time the vendee, who had received the invoice, did not communicate with the vendor, it was held that there was not sufficient evidence of acceptance to justify a jury in finding one. *Norman v. Phillips*, 14 M. & W. 277. Where the consignee of goods, sold by sample, sent for a bulk sample on their arrival at the carrier's warehouse, but refused to remove the bulk in order to favour the right of stoppage *in transitu*, though the goods did, in fact, answer the sample: held that, assuming the *transitus* to be ended, there was yet no acceptance. *Nicholson v. Bower*, 1 E. & E. 172; 28 L. J., Q. B. 97; but see *Cusack v. Robinson*, *post*, p. 473; and *Heinekey v. Earle*, 8 E. & B. 428; 28 L. J., Q. B. 79, Ex. Ch.

There may, however, be a *constructive acceptance* by acquiescence. Thus, where the goods were sent by a named carrier, and a letter of advice was forwarded to the vendee stating that the credit was three months, and the goods, after arrival, were seen by him in the warehouse of the carrier, when he told the carrier that he refused to take them, but made no communication whatever to the vendor till after five months; it was held that this was evidence to be left to the jury of acceptance and actual receipt. *Bushel v. Wheeler*, 15 Q. B. 442. In another case, where wheat was sent by a carrier

named by the vendee, who was to take it to a market town, where the vendee resold it by the same sample which he had taken from the vendor himself, but never inspected the bulk, this was held to be evidence of acceptance and receipt; *Morton v. Tibbett*, *Id.* 428. Goods not specified in the original contract, but selected by the vendor, and shipped by him for delivery to an inland carrier named by the vendee, who was to convey them to the vendee's residence, were lost at sea; a bill of lading had been sent to the inland carrier;—held that this was not evidence of an acceptance and receipt by the vendee, though it would have been a sufficient delivery to him, if the contract had been binding; and that the mere silence of the vendee, on hearing that the goods were shipped, would not justify a verdict for the vendor; neither the selection by the vendor, nor the receipt by the carrier, being an acceptance of those particular goods by the vendee. *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401 (overruling *Hart v. Sattley*, 3 Camp. 528); *accord. Hart v. Bush*, E. B. & E. 494; 27 L. J., Q. B. 271; and *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145, cited *ante*, p. 471. In *Meredith v. Meigh*, *supra*, it was said, *per curiam*, that if the vendee had received the bill of lading, and dealt with it as owner of the property, this would have been evidence of an acceptance and receipt. And it has since been ruled, on the authority of that case, and of *Morton v. Tibbett*, *supra*, that keeping and dealing with a bill of lading is evidence of acceptance. *Currie v. Anderson*, 2 E. & E. 592; 39 L. J., Q. B. 67. Where the vendee receives the articles sold, but disputes the alleged terms of sale on the delivery, the sale is good, and the terms may be proved by oral evidence. *Tomkinson v. Staigt*, 17 C. B. 697; 25 L. J., C. P. 85.

The circumstances in the following cases were held to constitute an acceptance and receipt within the statute. Where A. agreed to sell to B. 20 hogsheads of sugar then in bulk, and filled up and delivered 4, and afterwards filled up the remaining 16, and gave notice to the defendant, who said he would take them away as soon as he could, this was held to be an acceptance of the whole number of the hogsheads. *Rohde v. Thwaites*, 6 B. & C. 388. Where there was a written contract to deliver to defendant by A., as agent of another, and defendant accepted part after knowledge that A. was principal and not agent; held that he could not refuse to accept the residue, and might be sued by A. for non-acceptance. *Rayner v. Grote*, 15 M. & W. 359. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away; it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 East, 192. Where defendant selected and orally agreed to purchase certain goods of the plaintiff, and directed them to be sent to a particular wharf, where he was in the habit of warehousing his goods,—that was held sufficient to constitute an acceptance; and the goods having been placed on the wharf under the control of the defendant, so as to put an end to any rights of the plaintiff as unpaid vendor,—that was held a sufficient actual receipt. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261. Where the defendants agreed to purchase of the plaintiff four specific stacks of cotton waste at so much per lb.; they sent their packer with sacks, and carts to fetch it; he packed the waste in 81 sacks; 21 were weighed, loaded, and taken to the defendant's premises; the other sacks were not weighed; on arrival of the 21 sacks, the defendants refused to accept any of the waste, on the ground that it was of inferior quality to that purchased; and it was held that there was evidence of an acceptance and receipt. *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J., Ex. 159.

Though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept not as vendor but as bailee for the purchaser, the right of lien

is gone, and then there is a sufficient receipt to satisfy the statute; *per cur.*, S. C., citing *Beaumont v. Brengeri* and *Marvin v. Wallis*, *infra*. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order, and changing the horses from the stables in which they had been kept to his livery-stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant; *Elmore v. Stone*, 1 Taunt. 458; *Beaumont v. Brengeri*, 5 C. B. 301, *accord*. So where, on an oral sale of a horse by A. to B., B., without having had it in his possession, lent it to A. at his request for a few weeks, and B. afterwards refused to receive or pay for it; and the jury found that the contract of sale was completed before the loan of it to the vendor: held that there was an acceptance and actual receipt within the statute. *Marvin v. Wallis*, 6 E. & B. 726; 25 L. J., Q. B. 369. So, where the defendant bought some spirits from the plaintiffs, who sent an invoice of certain specified casks, terms six months' credit, and to lie in plaintiffs' warehouse till wanted, free six months; the plaintiffs kept a general bonded warehouse, and transferred the particular casks to the defendant's name in their warehouse book, as sold to him, after which the plaintiffs could not take them out; at the end of the six months the defendant asked the plaintiffs to take them back, or sell them for him; held there was evidence of a receipt and acceptance, as the character of the plaintiffs had changed from vendors to warehousemen or agents of the defendant. *Castle v. Swarder*, 6 H. & N. 828; 30 L. J., Ex. 310; Ex. Ch., reversing S. C., 29 L. J., Ex. 235. See also *Angel v. Ritch*, 4 W. N. 241, C. P. M. T. 1869. Wool, bought by defendant, was removed to the warehouse of a third person, M., by defendant's direction, and weighed and packed by him; the course of dealing was, that it should not be taken out of M.'s warehouse till payment; this nevertheless was held a delivery and acceptance, as the vendor had parted with possession, and had no lien, properly so called. *Dodsley v. Varley*, 12 Ad. & E. 632. Where the goods sold were in the defendant's possession at the time of the sale, a dealing with them by the defendant, and an account rendered to the plaintiffs by defendant, debiting himself with the price, are evidence of an acceptance by defendant; *Edan v. Dufield*, 1 Q. B. 302. Where the act done by the vendee is an ambiguous act, which may or may not be done as an act of ownership, it is evidence on which it ought to be left to the jury to say, whether or not, there had been an acceptance; *Parker v. Wallis*, 5 E. & B. 21. A. bargained for a horse then in a stable, and soon afterwards brought in a third person and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*; it was held that it ought to be left to the jury to say, whether this was or was not a delivery and acceptance. *Blenkinsop v. Clayton*, 7 Taunt. 597; and see *Phillips v. Bistolli*, 2 B. & C. 511. A wrongful taking by the vendee after a tender and refusal of the money is not an acceptance to bind the vendor. *Taylor v. Wakefield*, 6 E. & B. 765; see *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145, cited *ante*, p. 471.

There need not be an actual delivery, but there may be something tantamount; such as the delivery to the buyer of a key of the warehouse in which the goods are lodged, or the delivery of other *indicia* of property; *per* Ld. Kenyon, C.J., *Chaplin v. Rogers*, 1 East, 192, 195; and this is evidence of acceptance as well as of delivery; *Elmore v. Stone*, 1 Taunt. 460. So, where the purchaser cut down and sold some of a number of trees he had bought, this was held to be an acceptance and receipt. *Marshall v. Green*, 1 C. P. D. 35. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is a sufficient receipt within the statute, provided the person to whom

it is directed accept the order for delivery, and assent to hold the goods as the agent of the buyer. *Searle v. Keeves*, 2 Esp. 598; *Bentall v. Burn*, 3 B. & C. 426; *Salter v. Woollams*, 2 M. & Gr. 650.

When a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, under this section; *Elliott v. Thomas*, 3 M. & W. 170; and *Thompson v. Maceroni*, 3 B. & C. 1, *contra*, is there explained. And part acceptance is sufficient, although the rest are not even made; *Scott v. Eastern Counties Ry. Co.*, 12 M. & W. 33; for *Ld. Tenterden's* act, we have seen, is to be read as part of the Stat. of Frauds, and acceptance of part, and part payment, apply to contracts for goods to be made. But the contract for several things must be a joint one. Thus, if A. give to B. an absolute order for one, and a conditional order for another article, and B. sends both, A.'s acceptance of the former is not an acceptance of the latter. *Price v. Lea*, 1 B. & C. 156. Where a buyer selected separate lots of timber, at different and distant places, and various prices, shown to him by the same seller on one day, and afterwards included in one unsigned note, acceptance of one lot dispenses with a signed note. *Bigg v. Whisking*, 14 C. B. 195. The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance; *Hinde v. Whitehouse*, 7 East, 588; but otherwise where it is a sample merely, and forms no part of the bulk. *Talver v. West*, Holt, N. P. 178; *Cooper v. Elston*, 7 T. R. 14.

[*Earnest or part payment.*] If there be no note or memorandum in writing and no acceptance or receipt of the goods, then, to satisfy the statute, the buyer must give something in earnest to bind the bargain, or in part payment. Earnest is given by the buyer, and not by the seller, and the part delivery of goods is not (as Blackstone assumes, in the passage cited *ante*, pp. 466, 467) by the way of earnest. In cases of sale at common law, earnest has an effect different from that of the *arræ* of the civil law, by binding the bargain, instead of merely affording additional proof of it. It is either money or other thing given, to bind the bargain, and to show that it is concluded, and no longer remains in mere proposal or in *feri*. If given in money, it presumably forms part of the price, like a deposit at an auction, *Portage v. Cole*, 1 Wms. Saund. 319. If it be some other article, it is in the nature of a pledge; Pothier, *Cont. de Vente*, p. 6, c. 1, art. 3, s. 2. Acceptance of earnest changes the property; *Langfort v. Tiler*, 1 Salk. 113; *Hinde v. Whitehouse*, 7 East, 558, 571. Customary forms of concluding bargains, as where the purchaser draws the edge of a shilling across the hand of the vendor and returns the money into his own pocket, are not equivalent to earnest or part payment, within the statute. *Blenkinsop v. Clayton*, 7 Taunt. 597. A bargain, that the vendor shall take, in part payment, a debt due from him to the vendee, is not in itself a sufficient part payment to dispense with a writing; no money having actually passed, nor receipt for the debt given by the vendee; for this would in effect let in proof of the contract itself in order to evade the statute. *Walker v. Nussey*, 16 M. & W. 302.

[*What note is sufficient within the Stat. of Frauds*, s. 17.] The word bargain used in sect. 17 (like the word "agreement" in sect. 4, *ante*, p. 468) means the terms upon which the parties contract. *Kenworthy v. Schofield*, 2 B. & C. 947. The note in writing must contain all the terms of the agreement, or be connected with some other document which does. S. C. Several documents, if sufficiently connected, will constitute a good memorandum within the statute. *Jackson v. Lowe*, 1 Bing. 9; *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *Warner v. Willington*, 3 Drew, 523; 25 L. J., Ch. 662. A promise in writing signed, to pay any one unnamed who shall furnish goods to the writer or a third person making default, will be-

come a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. *Williams v. Byrnes*, 1 Moo. P. C., N. S. 154, 198. It must contain the names of both the contracting parties or their agents; *Champion v. Plummer*, 1 N. R. 252; *Graham v. Musson*, 7 Scott, 769; 5 N. C. 603; *Williams v. Byrnes*, *supra*: as buyer and seller, *Vandenbergh v. Spooner*, L. R., 1 Ex. 316. In this last case the memorandum was as follows: "S. (the defendant) agrees to buy the whole of the lots of marble purchased by V. (the plaintiff) now lying at L. C., at 1s. a foot. (Signed) S.;" it was held that it did not satisfy the statute, because V. did not appear to be the seller. But in *Newell v. Radford*, L. R., 3 C. P. 52, the following memorandum was held sufficient: "N. (the plaintiff), 32 sacks culasses at 39s.; 280 lbs. to wait orders. J. W.;" it was proved orally that J.W. was the defendant's agent, that the defendant was a flour dealer, and the plaintiff a baker, and the court drew inferences from the surrounding circumstances to explain the ambiguity in the memorandum.

Where there is an insufficient memorandum, such as an unsigned order for goods, a subsequent letter signed by the defendant, referring to the order, is sufficient; *Saunderson v. Jackson*, 2 B. & P. 238. *Buxton v. Rust*, L. R., 7 Ex. 1, 279, Ex. Ch.; but the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though he recognizes the order, he disaffirms or adds to the terms of the memorandum. *Cooper v. Smith*, 15 East, 103. *Vide ante*, p. 288. A letter, however, referring to all the essential terms of the contract, but refusing to carry it out, is sufficient. *Bailey v. Sreeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; *Buxton v. Rust*, *supra*; *Wilkinson v. Evans*, L. R., 1 C. P. 407. So, a memorandum, written and signed by the defendant on the back of an invoice of those goods sold to him by the plaintiff; "The cheese came to-day, but I did not take them in, for they were very badly crushed. So the candles and cheese is returned," was held sufficiently to refer to the contents of the invoice, and the two together were a sufficient memorandum to satisfy the statute. S. C. The letter referring to the terms of the contract need not be to the other party to the sale. Thus, when the defendant's agent bought for him a mare of the plaintiff, and the agent wrote to the defendant telling him the purchase he had made of the plaintiff (naming him), and the price, and the defendant wrote back saying he would send the agent a cheque for the mare "which you have purchased for me," these letters were held a sufficient memorandum. *Gibson v. Holland*, L. R., 1 C. P. 1. See further as to the requisites of a sufficient note, *ante*, pp. 287, *et seq.*

The omission of the particular mode, or time of payment, or even of the price itself, does not necessarily invalidate the contract. *Valpy v. Gibson*, 4 C. B. 837. Where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price must be presumed, and the contract should be so stated. *Hoadley v. M'Lain*, 10 Bing. 482; but, where the memorandum is silent as to price, and it appears by the evidence that a specific price was agreed upon, the written memorandum is imperfect, and cannot be given in evidence. *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 574; 26 L. J., Ex. 145. A distinction was indeed suggested by the court in *Acebal v. Levy*, 10 Bing. 382, that where the contract is silent to the price, but has been executed, a reasonable price will be inferred; though it was thought questionable whether it is so when the contract is executory only, and the goods are still in the possession or power of the seller. But the case of *Hoadley v. M'Lain*, *supra*, which was for not accepting a carriage made to order, does not sanction this distinction, nor was any made in *Valpy v. Gibson*, *supra*, where *Hoadley v. M'Lain*, *supra*, was recognized. This inconvenience of the above rule is obvious. If a contract omitting the price has the legal effect of a contract for a reasonable price, then oral evidence of

a fixed price ought to be excluded as being inconsistent with the written contract. (See cases, *ante*, pp. 15, *et seq.*) Yet, according to the above ruling, the evidence is to be admitted; and that for the purpose, not of supporting, but of destroying the efficacy of the writing, and defeating the demand by proof of a fact which, if true, ought to entitle the opposite party to recover.

An agreement to sell on "moderate terms" is enough. *Aschcroft v. Morrin*, 4 M. & Gr. 450. Where the price is ambiguous, as where hops are sold "at 100s.," this may be explained orally to mean *per cwt.* *Spicer v. Cooper*, 1 Q. B. 424, see *ante*, pp. 21, *et seq.* A buyer wrote his address in the seller's order book, which had the seller's name on the fly leaf, and a description and the price of the article: held a sufficient note of the buyer, though it did not specify an alteration in it to be made by the seller. *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78. See *Goodman v. Griffiths*, and *Elmore v. Kingscote*, *ante*, p. 476.

The written memorandum must be made before action brought. *Bill v. Bament*, 9 M. & W. 36. Where a written order was given by defendant for goods of the price of 10*l.* and upwards, which defendant accepted with the accompanying invoice, and neither order nor invoice mentioned the time of payment, defendant was allowed to prove a previous conversation between plaintiff and defendant showing that the sale was to be on credit. *Lockett v. Nicklin*, 2 Exch. 93. In this case the acceptance was sufficient within the statute, and no written memorandum being necessary, the oral evidence was admitted as not inconsistent with the writing, and forming with it the complete contract; *vide ante*, p. 17.

The terms of the written contract cannot be orally varied, *vide ante*, p. 28; *Plevins v. Downing*, 1 C. P. D. 220. But, forbearance on the part of the plaintiff is not a variation. *Ogle v. Vane, El.*, L. R., 3 Q. B. 272, Ex. Ch.; *Hickman v. Haynes*, L. R., 10 C. P. 598. Where the buyer, after an oral contract, receives without objection, an invoice or sold note, signed by the seller, differing from the contract, he cannot, in a case within the statute, set up the original terms to contradict the sold note. *Harnor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53.

To be made and signed by the parties to be charged.] It is not necessary that the note or memorandum should be signed by both parties to the contract. It is sufficient if it be signed by the party to be charged. *Laythorp v. Bryant*, 2 N. C. 735. A proposal in writing signed by the party to be charged and verbally accepted by the person to whom it is made is sufficient. *Reuss v. Picksley*, L. R., 1 Ex. 342, Ex. Ch.; *Buxton v. Rust*, L. R., 7 Ex. 279, Ex. Ch.; see *Watts v. Ainsworth*, 1 H. & C. 83; 31 L. J., Ex. 448. And it makes no difference that there is no remedy against the person who does sign. *Allen v. Bennet*, 3 Taunt. 169. It is immaterial where the signature is placed on the document. A person writing at the head of a note, I, A. B. agree, or A. B. agrees, is sufficient, although the document is not signed at the bottom. *Knight v. Crockford*, 1 Esp. 190; *Saunderson v. Jackson*, 2 B. & P. 238; *Schnieder v. Norris*, 2 M. & S. 286; *Durrell v. Evans*, *post*, p. 478. But, the signature must be so introduced as to govern or authenticate every material part of the instrument. *Hubert v. Turner*, 4 Scott, N. R. 486; *Caton v. Caton*, L. R., 2 H. L. 127, decided on sect. 4. The question, however, is always open to the jury, whether the party, not having regularly signed it at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it; but, where it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him; *per* Ld. Abinger, in *Johnson v. Dodgson*, 2 M.

& W. 659; in which case the defendant wrote, "Sold J. Dodgson," (his own name), so and so, and requested the plaintiff's agent to sign the entry; and the court held the defendant bound by such entry. Where a person is in the habit of printing instead of writing his name, that will be a sufficient signature, *per* Eldon, C.J., *Saunderson v. Jackson*, *ante*, p. 477. Where the name of a vendor is printed on a bill of parcels, on which the name of the vendee is written by the vendor, that is a sufficient signature to charge the vendor. *Schnieder v. Norris*, *ante*, p. 477. See some additional cases, *ante*, pp. 289, 290. Signature by mark or initials is sufficient, *vide ante*, p. 289.

[*Or by their agents thereunto lawfully authorized.*] An agent, to bind the defendant by his signature, must be some third person, and not the other contracting party. *Farebrother v. Simmons*, 5 B. & A. 333; *Wright v. Dannah*, 2 Camp. 203; *Bird v. Boulter*, *ante*, p. 290; *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch.

It is not necessary that an agent should have the authority of his principal by a written instrument; an oral authority is sufficient. *Rucker v. Cammeyer*, 1 Esp. 105; *Emmerson v. Heelis*, 2 Taunt. 38. Although the agent may not have had authority at the time of signature, it will be sufficient if the principal subsequently recognizes the agent's act, and adopts the contract. *Maclean v. Dunn*, 4 Bing. 722. Where A. by his traveller B. sold goods to C., and at the time of the sale B., at the request and in the presence of C., made an entry of the sale in C's book, and signed it in his, B's, own name, it was held there was no sufficient note within the statute to bind C., because the circumstances did not show any authority to B. to sign on C's behalf. *Graham v. Musson*, 5 N. C. 603. The plaintiff, his agent, N., and the defendant E., met, and after agreeing upon the price of certain hops, N. wrote a sale note, heading it "E., bought of," &c. At E.'s request an alteration was made in one of the terms of the note, which was then given to him. It was held that N. was E.'s agent to draw up and sign for him a memorandum of the contract, between them, and therefore E. was bound thereby. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J., Ex. 337, Ex. Ch. "If the name appears on the contract, and be written by the party to be bound, or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient." *Per* Blackburn, J., S. C.; see *Thompson v. Gardiner*, 1 C. P. D. 777.

But the mere writing by the plaintiff's traveller in the presence of the defendant of a duplicate memorandum of the defendant's order, with his name as purchaser, which duplicate was handed to and kept by the defendant, was held insufficient, as it did not appear that the traveller had signed as agent for the defendant, or had authority so to do. *Murphy v. Boese*, L. R., 10 Ex. 126.

As to a telegram sent by the defendant being a sufficient signed memorandum, see *Godwin v. Francis*, L. R., 5 C. P. 295, cited *ante*, p. 290. The sender is not liable for a mistake of the telegraph clerk in sending the message. *Henkel v. Pape*, L. R., 6 Ex. 7.

[*Sale by Auction.*] A sale of goods by auction is within sect. 17. *Kenworthy v. Schofield*, 2 B. & C. 945. Where the same person buys several lots, and the auctioneer writes down the vendee's name each time, there is a distinct and independent contract as to each lot. *Roots v. Dormer, Ltd.*, 4 B. & Ad. 77; *Emmerson v. Heelis*, *supra*. An auctioneer is for some purposes an agent for both parties; therefore where an auctioneer writes down the buyer's name in the catalogue, opposite the lot, together with the price bid, it is a sufficient memorandum. *Emmerson v. Heelis*, *supra*; *Kenworthy v. Schofield*, *supra*. But, where the conditions of sale are not

annexed or referred to in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, ante, p. 478. *Peirce v. Corf*, L. R., 9 Q. B. 210; *Riahton v. Whatmore*, 8 Ch. D. 467. It must, however, be observed that the auctioneer only becomes the vendee's agent after his bid is accepted; before then he is exclusively the vendor's agent. *Warlow v. Harrison*, 1 E. & E. 295, 309; 28 L. J., Q. B. 18; 29 L. J., Q. B. 14. Where the auctioneer himself sues, his signature for the defendant cannot be relied upon as a compliance with the statute. See *Farebrother v. Simmons*, 5 B. & A. 333; *Sharman v. Brandt*, L. R., 6 Q. B. 720, and cases cited, ante, p. 290. Where a person, to whom money was due from the owner of goods sold by auction, agreed with the owner before the auction that goods bought by him should be set against the debt, and he became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the conditions of sale which specified that purchasers should pay part of the price at the time of the sale and the rest on delivery. *Barilett v. Purnell*, 4 Ad. & E. 792. But, in general, where there are printed conditions of sale, no oral declaration made by the auctioneer at the time of the sale is admissible in evidence to alter them. *Shelton v. Livius*, 2 C. & J. 411. Though where the goods are of less value than 10*l.*, and there is no signature, such declarations are admissible; *Eden v. Blake*, 13 M. & W. 614; and *semble*, per Rolfe, B., S. C., that as the contract would be complete on the fall of the hammer, a subsequent signing by the auctioneer would make no difference. As to the right to retract biddings, *vide ante*, p. 290.

Sale by a broker.] Where a broker is the agent of both parties, he may bind them by signing the same contract on behalf of the buyer and seller. See the usual forms, and the effect of brokers' notes fully considered in Blackburn's Treatise on Contract of Sale, Part I., c. 5. The practice (at least among London brokers) is to make an entry of the contract in his book and sign it, and then to send a copy of it to each party, and, in general, the "bought note" to the buyer, and "sold note" to the seller, and these notes, duly delivered by the broker to the parties, have been held, if not the contract itself, proper evidence of the contract, and constitute a sufficient note in writing to bind each party. *Rucker v. Cammeyer*, 1 Esp. 105; *Thornton v. Meux*, M. & M. 43; *Trueman v. Loder*, 11 Ad. & E. 589. And such notes are admissible, where the entry in the broker's book has never been signed by him. *Goom v. Afalo*, 6 B. & C. 117. But, if the entry in the book has been signed, it is questionable whether this is not the best evidence, as being the original entry of the contract. See *Heyman v. Neale*, 2 Camp. 337. "Where there has been an entry of the contract by the broker in his book, signed by him, I should hold, without hesitation, notwithstanding some dicta and a supposed ruling of *Ld. Tenterden* in *Thornton v. Meux* (*supra*) to the contrary, that this entry is the binding contract between the parties, and that a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, would not affect its validity." "But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold note as before. If these agree they are held to constitute a binding contract. If there be any material variance between them they are both nullities, and there is no binding contract;" per *Ld. Campbell*, C.J., in *Sievwright v. Archibald*, 17 Q. B. 124-5; 20 L. J., Q. B. 538; and see per *Patterson*, J., S. C. Where there is a material variance between the bought and sold notes, and the broker has not signed the contract in his book, there is no valid contract. *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737; *Cowie v. Remfrey*, 5 Moo. P. C. 232. But, where the differences

can be reconciled by oral testimony of mercantile usage, and shown to be only apparent, such evidence is admissible. *Bold v. Rayner*, 1 M. & W. 343; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191. Where the bought note was in the form "Bought of R. & Co., for account of H. & Co.," and the sold note in the form, "Sold to our principals for account of R. & Co.," it was held there was no variance between them, oral evidence being admissible to show who the principals were. *Cropper v. Cook*, L. R., 3 C. P. 194. Where the sold note is in the name of an agent, it may be shown orally on behalf of the buyer, that in all previous transactions between them the vendor had contracted in the agent's name. *Trueman v. Loder*, ante, p. 479. So, where the contract was made by a broker, on behalf of principals whose names were not disclosed, oral evidence that by the usage in London in such a case the broker is liable to be treated as principal, is admissible to charge the broker. *Humfrey v. Dale*, 7 E. & B. 266; 26 L. J., Q. B. 137; E. B. & E. 1004; 27 L. J., Q. B. 390; Ex. Ch.; *Cropper v. Cook*, supra. Evidence may be given to prove the custom in such a case, in the same, or in an analogous trade. *Fleet v. Murton*, L. R., 7 Q. B. 126.

Where a broker employed to buy goods for his principal, A., himself sells the goods, he cannot sign a valid note, so as to bind A., and, indeed, it seems that there is no contract at all. *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch. In an action by the purchaser against the seller of goods for not delivering them, the bought note *per se* is evidence of the contract against the seller on proof of the employment of the broker by him. *Hawes v. Forster*, 1 M. & Rob. 368. The conduct of the defendant may afford evidence that the broker was authorized to contract for him. *Thompson v. Gardiner*, 1 C. P. D. 777. If the seller intend to insist on a variance between the bought and sold note, it is for him to produce and prove the latter. *Hawes v. Forster*, supra. So, the sold note signed by the broker acting for both parties, and delivered by him to the purchaser, is a sufficient memorandum to bind the purchaser within sect. 17, in the absence of proof of any variance between it and the bought note. *Parton v. Crofts*, 13 C. B., N. S. 11; 33 L. J., C. P. 189. Even if they differ, yet if one be signed by a principal in the contract, it will be evidence of the contract as against him. *Rowe v. Osborne*, 1 Stark. 140. So, where the notes disagree, the entry in the book, if brought home to the knowledge of the parties, or even if not known to them, may be evidence of the contract; *semb. Thornton v. Charles*, 9 M. & W. 802; and see the observations of Parke, B., in that case; but the point is not a settled one; see *Heyman v. Neale*, *Siewerwright v. Archibald*, ante, p. 479; and *Parton v. Crofts*, supra. Where the broker in the bought and sold notes described the sellers' firm as A., B., and C.; but the firm had, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E. might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Mitchell v. Lapage*, Holt, N. P. 253.

A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made and without the consent of the purchaser, precludes the seller from recovering. *Powell v. Divett*, 15 East, 29. So, where the buyers altered the bought note in a material particular by an addition at the foot of it (referred to by an asterisk in the body of it), though the breach was unconnected with the alteration. *Mollett v. Wackerbarth*, 5 C. B. 181. Where the sold note was sent back altered and signed by the seller, and the buyer proceeded on it as the contract, it was held to be a question for the jury whether this was a contract, or only an offer by the seller provided a bought note to the like effect were signed by the buyer. In this case there was no bought note in evidence at all, and the

broker was agent of the buyer only. *Moore v. Campbell*, 10 Exch. 323; 23 L. J., Ex. 310. If the two principals agree in the broker's presence, and the broker's note does not correspond with the terms agreed upon, then there is no written contract by an agent lawfully authorized, and a party, who did not assent to the alteration, is not bound. *Pitts v. Beckett*, 13 M. & W. 743; *contra*, where there is evidence from which a subsequent assent to such alteration may be implied. *Harnor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53.

A distinction has been made between a *contract in writing* and a *note or memorandum in writing of a contract* within the Stat. of Frauds. See the judgments in *Sievwright v. Archibald*, 17 Q. B. 107, 114, 124; 20 L. J., Q. B. 538; and in *Parton v. Crofts*, *ante*, p. 480; but in many cases this distinction seems to have been lost sight of.

Readiness of the plaintiff to deliver.] An averment of readiness and willingness to deliver is sufficient, where delivery and payment are to be concurrent acts. *Boyd v. Lett*, 1 C. B. 222; *Jackson v. Allaway*, 6 M. & Gr. 942. It is enough for the plaintiff to show under this allegation, either that he has offered to deliver, or that the defendant has dispensed with delivery, or has made it an idle and useless form to attempt to deliver. The averment involves the *ability* of the plaintiff to deliver; *Lawrence v. Knowles*, 5 N. C. 399; *De Medina v. Norman*, 9 M. & W. 820; *Spotswood v. Barrow*, 1 Exch. 804. On a claim averring readiness of the plaintiffs to manufacture certain articles ordered by the defendant, it is enough to show that the defendant had countermanded the manufacture while in progress and after delivery of some, and had notified his refusal to accept any more; and, *per cur.*, in common sense, the meaning of such an averment "must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendant." *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127, 144; 20 L. J., Q. B. 460; *Baker v. Farminger*, 28 L. J., Ex. 130. Under the traverse of this allegation, the plaintiff must prove that he is ready to deliver an article corresponding with that which was contracted for; *per Cresswell, J.*, in *Boyd v. Lett*, *supra*; and an opportunity must be given for examination; *Isherwood v. Whitmore*, 10 M. & W. 757.

Under a contract for the sale of a cargo, if the buyer reject a cargo tendered, the seller may, within the time limited by the contract, tender another cargo. *Borrowman v. Free*, 4 Q. B. D. 500. As to what is sufficient tender of bills of lading, on the sale of goods to be shipped, see *Sanders v. Maclean*, 11 Q. B. D. 327, C. A.

Where the plaintiff has, otherwise than at the buyer's request, delayed delivery beyond the proper time, he cannot enforce acceptance, unless the defendant has entered into a new binding contract; *Plevins v. Downing*, 1 C. P. D. 220. As to waiver by the buyer, of performance by the seller, of a term of the contract, see *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140, cited *post*, p. 496. See, however, *Sanderson v. Graves*, L. R., 10 Ex. 234.

Refusal to receive.] It must be shown that the defendant has refused to receive under circumstances which do not warrant a refusal. Therefore, where a tender is necessary, it must be made at a reasonable time and place, and be such as to afford the defendant an opportunity of examining and receiving the goods; for without such opportunity it is no tender. Thus, a tender of articles in closed casks, so as to prevent inspection, is no tender. *Isherwood v. Whitmore*, *supra*. Nor is it sufficient to show a tender of the goods at the defendant's warehouse at a late hour after it is shut up, and

the defendant has left it. But if the defendant is present, and able to examine and receive them, the tender will not be bad merely because the hour is late and unreasonable. *Startup v. Macdonald*, 6 M. & Gr. 593. On the sale of goods for shipment by steamer or steamers, the defendant must accept such part of the goods as arrives in one steamer. *Brandt v. Lawrence*, 1 Q. B. D. 344, C. A. But where on the sale of 25 tons pepper, October shipment, the name of vessel, &c., were to be declared within 60 days from the date of the bill of lading, and within the time 25 tons were declared by the B. vessel, only 20 tons of which complied with the contract, and no further declaration was made, it was held that the defendant need not accept the 20 tons. *Reuter v. Sala*, 4 C. P. D. 239, C. A. The tender must not be of a larger quantity than was bought; *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; at least, unless the tender be divisible, or the surplus not charged for. If the buyer give a limited order for certain specified goods, and the seller sends those and others from a distant place in one package, charged at a lump sum, the consignee may repudiate the whole and refuse to receive the package. *Levy v. Green*, 8 E. & B. 575; 27 L. J., Q. B. 111; Ex. Ch., 1 E. & E. 969; 28 L. J., Q. B. 319; and see *Macdonald v. Longbottom*, 1 E. & E. 977, 987; 28 L. J., Q. B. 293; 29 L. J., Q. B. 256; *Tamvaco v. Lucas*, 1 E. & E. 581; 28 L. J., Q. B. 150, 301. If the defendant notify his intention to refuse, and forbid the plaintiff to deliver goods ordered to be made, then the plaintiff need not proceed to complete the contract on his part, and may show this under an alleged refusal to accept, although the goods are not ready for delivery, and could not be delivered; for the plaintiff is thereby "discharged" from proceeding further; and such a notice to the plaintiff will support an allegation that the defendant "prevented and discharged" the plaintiff from supplying the goods and executing the contract. *Cort v. Ambergate Ry. Co.*, ante, p. 481. And a countermand by the person ordinarily representing the defendant in his dealings with the plaintiff (as the engineer of a railway) is sufficient, although the defendant be a corporate body, and the notice not under seal; S. C. See further, as to readiness to receive, *post*, p. 488.

Damages.] In an action for not accepting goods, the difference between the contract price and the market price on the day the contract was broken is the ordinary measure of damages. *Boorman v. Nash*, 9 B. & C. 145; *Boswell v. Kilborn*, 15 Moo. P. C. 309. And the right to re-sell (though not the obligation to do so) exists in all cases of sale where the vendee wrongfully refuses to receive, and there is no express stipulation precluding such right. *Macleun v. Dunn*, 4 Bing. 722, 728; *Barrow v. Arnaud*, 8 Q. B. 609-610, Ex. Ch. And it makes no difference in this respect whether there be or be not, an express condition of re-sale. *Lamond v. Davall*, 9 Q. B. 1030. Where goods were to be delivered at a certain time, and while on their way the vendee gave notice that he would not accept, the measure of damages is the difference between the contract price and the market price on the day fixed for the delivery, and not that on the day on which the seller received the notice. *Phillipotts v. Evans*, 5 M. & W. 475; and see *Leigh v. Paterson*, 8 Taunt. 540, *post*, p. 491. Where the defendant has ordered goods and then wrongfully countermanded the order, and thereupon the vendor ceases to manufacture them, he is entitled to damages for the goods in hand, and to such profit as he would have made if the contract had been fully carried out; *Dunlop v. Higgins*, 1 H. L. C. 381. Where the payment was to be by bill, plaintiff may recover the amount which would have accrued on it for interest; *Boyce v. Warburton*, 2 Camp. 480. Where no difference is proved between the contract price and the market price, only nominal damages are recoverable. See *Valpy v. Oakeley*, 16 Q. B. 941.

Defence.

By Rules, 1883, O. xix., r. 15, the defendant must plead specially all facts not previously stated on which he relies, and must raise all such grounds of defence as if not pleaded would be likely to take the plaintiff by surprise; and r. 17 provides that the defendant shall not deny generally the allegations in the statement of claim; *vide ante*, p. 283. Where therefore the defence is that the contract is materially different from the one alleged in the statement of claim, or that the goods were in fact sold with a qualification or condition annexed, which the goods tendered did not satisfy, this must be specially pleaded in the defence.

The admissibility of evidence under certain common defences will be found hereafter under the general head of *Defences in actions on simple contracts*.

Denial of Contract.] By Rules, 1883, O. xix., r. 20, *ante*, p. 283, a denial of a contract operates only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law whether with reference to the Statute of Frauds or otherwise. This requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under the Statute. *Clarks v. Callow*, 46 L. J., Q. B. 53, C. A.

The following are defences which must also be specially pleaded:—Where a joint order is given for several articles at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered; *Champion v. Short*, 1 Camp. 53; and where goods are sold as “about” a certain quantity, “more or less,” the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept 350 tons on a bargain for “about 300 tons, more or less;” at least, not unless it be shown that a large excess was contemplated; *Cross v. Eglin*, 2 B. & Ad. 106; *Tamvaco v. Lucas*, *ante*, p. 482. See also *Cockerell v. Aucompte*, 2 C. B., N. S. 440; 26 L. J., C. P. 194; *Macdonald v. Longbottom*, 1 E. & E. 977, 987; 28 L. J., Q. B. 293; 29 L. J., Q. B. 256; *Beckh v. Page*, 5 C. B., N. S. 708; 7 *Id.* 861; 28 L. J., C. P. 164, 341; *Morris v. Levison*, 1 C. P. D. 155. Where the defendant instructed the plaintiffs to buy for him 50 tons of sugar, “50 tons more or less of no moment if you are enabled to get a suitable vessel;” and the plaintiffs bought 400 tons, parcel by parcel according to the usage of the market, and could buy no more at the price named, it was held that the defendant was not bound to accept the 400 tons, as the usage could not affect the express order; *Ireland v. Livingston*, L. R., 5 Q. B. 516, Ex. Ch.; (reversed on another ground; L. R., 5 H. L. 395). See, however, *Johnston v. Kershaw*, L. R., 2 Ex. 82. A contract to sell “all spars manufactured by M., say about 600 red pine spars,” was held not to amount to a warranty as to the quantity of the spars; *McConnel v. Murphy*, L. R., 5 P. C. 203. See also *Gwillim v. Daniell*, 2 C. M. & R. 61. A contract to buy “a cargo of about the following lengths, &c., in all about 60 fathoms,” is not satisfied by the delivery of 60 fathoms, part of a cargo of 80 fathoms, although the 60 fathoms were severed from the remainder, for “cargo” means the whole loading of the ship; *Kreuger v. Blanck*, L. R., 5 Ex. 179, following *Sargent v. Reed*, 2 Str. 1228; *Borrowman v. Drayton*, 2 Ex. D. 15, C. A.; *Anderson v. Morice*, 1 Ap. Ca. 713, D. P.

A sale of goods "on arrival," or "to arrive" in a particular ship is a contract for the sale of goods at a future period, subject to the double condition of the arrival of the ship and the goods being on board, and is not a warranty on the part of the seller that the goods shall arrive; *Boyd v. Siffin*, 2 Camp. 326; *Hawes v. Humble*, *Id.* 327, n.; *Lovatt v. Hamilton*, 5 M. & W. 639; *Johnson v. Macdonald*, 9 M. & W. 600. See also *Smith v. Myers*, L. R., 5 Q. B. 429; L. R., 7 Q. B. 139, Ex. Ch. But, a contract for the sale of goods "now on passage and expected to arrive by," or "to be delivered on the safe arrival of," a certain ship; *Gorriessen v. Perrin*, 2 C. B., N. S. 681; 27 L. J., C. P. 29; *Hale v. Rawson*, 4 C. B., N. S. 85; 27 L. J., C. P. 189; is conditional on the arrival of the ship only. The stipulation in a contract of sale, "the cotton to be taken from the quay," was held an independent stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed; *Neill v. Whitworth*, 18 C. B., N. S. 435; 34 L. J., C. P. 155; Ex. Ch., L. R., 1 C. P. 684. See also *Castle v. Playford*, L. R., 7 Ex. 98, Ex. Ch., reversing *S. C.*, L. R., 5 Ex. 165. A sale of a cargo "from the deck" means that the vendor is to pay the harbour dues. *Playford v. Mercer*, 22 L. T., N. S. 41, Q. B.

When goods are supplied under a single special contract with a committee of several persons, and a new member of the committee is added before the contract has been performed, he cannot be joined as co-defendant in an action for not accepting, though he assented to and recognized the contract after he had become a member; *Beale v. Moulds*, 10 Q. B. 976; *accord. Newton v. Belcher*, 12 Q. B. 921; and it matters not whether the property in the goods sold vested in successive portions during the execution of the contract. But it might be otherwise, if the circumstances were such, that a new contract could be implied, on successive deliveries, or successive acts, done by the plaintiff; as on a standing contract to work for a firm, on certain terms, when required; see the cases *supra*, and *Helsby v. Mears*, 5 B. & C. 504. A person employed by the defendant, as broker to buy the goods, cannot himself be the vendor; *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch.; even by the usage of the market, if the principal was ignorant of the usage. *Mollett v. Robinson*, L. R., 5 C. P. 646; Ex. Ch., L. R., 7 C. P. 84; L. R., 7 H. L. 802.

Repudiation of the goods.] In the case of sales by sample, if the bulk does not correspond with it, the defendant may refuse to receive it, and may keep the article a reasonable time to examine, and then repudiate it; *per cur.*, *Street v. Blay*, 2 B. & Ad. 463; *Bannerman v. White*, 10 C. B., N. S. 844; 31 L. J., C. P. 28; *Heilbutt v. Hickson*, L. R., 7 C. P. 438, 451. In such case the buyer may reject, by notice to the seller, that he will not accept the goods, and that they are at the seller's risk; he is not bound to return or to offer to return them. *Grimolby v. Wells*, L. R., 10 C. P. 291.

There is a distinction made between the sale of a specific article with a warranty, and an executory contract for the supply of goods of a particular quality. In the last case the goods may be refused or returned, if not of the kind contracted for; but in the former case the remedy is either an action by the buyer on the warranty, or proof by him in reduction of damages in an action by the vendor, unless there be not merely misrepresentation or breach of warranty, but fraud; or unless there be a condition in the contract providing for the return of the goods in such case. *Street v. Blay*, *Heilbutt v. Hickson*, *supra*; *Dawson v. Collis*, 10 C. B. 523; 20 L. J., C. P. 116; *Heyworth v. Hutchinson*, L. R., 2 Q. B. 447. See *Couston v. Chapman* L. R., 2 H. L. Sc. 250, 254. But where a contract is made for the purchase of hops by sample, conditional on sulphur not having been used in their

growth, if sulphur has been so used, the defendant may reject the hops, although they correspond with the sample; *Bannerman v. White*, 10 C. B., N. S. 844; 31 L. J., C. P. 28; and where goods are sold under a certain denomination, the defendant is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk and without warranty. *Josling v. Kingsford*, 13 C. B., N. S. 447; 32 L. J., C. P. 94; and see *Hopkins v. Hitchcock*, 14 C. B., N. S. 65; 32 L. J., C. P. 154; *Jones v. Just*, L. R., 3 Q. B. 197, *ante*, pp. 437, 438, and *Shand v. Bowes*, 2 Ap. Ca. 455, 480, *per* Ld. Blackburn. A contract for the sale of 600 tons (8200 bags) of rice to be shipped at Madras "during the months of March ^{and} April," *per Rajah*, is not satisfied by the delivery of rice all shipped in February except 50 bags shipped on March 2nd. S. C., D. P. See also *Reuter v. Sala*, *infra*. On the sale of goods by a manufacturer of such goods who is not otherwise a dealer in them, the buyer is entitled to receive the goods as of the manufacturer's own make; *Johnson v. Raylton*, 7 Q. B. D. 438, C. A.; unless a custom in the particular trade is proved that the goods of another make may be substituted. S. C.

So, if the sale note refer to the sample, and the bulk prove not to be of the same *kind* as the sample, the buyer may reject the goods, even though there be a condition in the contract, that the contract should not be avoided if the bulk prove of inferior *quality* to the sample, but that an allowance should in that case be made. *Azémar v. Casella*, L. R., 2 C. P. 431; *Ex. Ch.*, *Id.* 677. But, generally, where the seller produces a sample, and represents that the bulk is of equal quality, and the sale note does not refer to any sample, the defence that the goods are not equal to it is inadmissible. *Meyer v. Everth*, 4 Camp. 22; *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 634. The defendant may, however, show that all sales of tobacco are by sample by general usage in that trade, though there was no mention of sample in the contract. *Syers v. Jonas*, 2 Exch. 111. And the plaintiff may show in reply the custom of certain markets as to the time for objecting to the bulk, or as to returning, or allowing for, articles not answering the sample. *Sanders v. Jameson*, 2 Car. & K. 557; *Cooke v. Riddelien*, 1 Car. & K. 561.

The purchaser by sample has a right to inspect the whole in bulk at any proper and convenient time; and if the seller refuse to show it, he may rescind the contract. *Lorymer v. Smith*, 1 B. & C. 1; see *Parker v. Palmer*, 4 B. & A. 387.

The question whether stipulations as to time, in a contract for the sale of goods, are of the essence of the contract, so that they form conditions precedent, depends on the construction of the contract in each case; the rule of equity stated *ante*, p. 295, is confined to contracts for the sale of land. *Reuter v. Sala*, 4 C. P. D. 239, 249, *per* Cotton, L. J. Thus where a contract of the sale of goods, to arrive by ship, provides that the name of the vessel, marks, and particulars shall be declared "within 60 days from the date of the bill of lading," such time is of the essence of the contract, and if such declaration be not made within the time limited, the buyer is not bound to accept the goods. S. C. See further, *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J., Ex. 73 (explained by C. A. in *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 658, 671); *Coddington v. Paleologo*, L. R., 2 Ex. 193; and *Shand v. Bowes*, *supra*. But in general a partial breach by the plaintiff of his contract to deliver does not justify the defendant in subsequently refusing to accept. *Jonassohn v. Young*, 4 B. & S. 296; 32 L. J., Q. B. 385. See further as to the effect of a partial breach, *Simpson v. Crippin*, *Freeth v. Burr*, and other cases cited, *post*, p. 488.

Fraud.] A wilful misrepresentation by the vendor, which induced the defendant to purchase, will warrant the defendant in refusing to complete the contract; but this must be pleaded specially. Even where the sale is "with all faults," any artifice to disguise a fault may vitiate the sale. *Baghole v. Walters*, 3 Camp. 154; *Schneider v. Heath*, *Id.* 506. See *Ward v. Hobbs*, 3 Q. B. D. 150, C. A.; 4 Ap. Ca. 13, D. P.

Goods bargained and sold.

Where the property has passed to the buyer, the vendor may sue for goods bargained and sold, and will be entitled to recover the whole value of the goods; *Hankey v. Smith*, Peake, 42, n. But there must have been an acceptance of part, or part payment, or earnest, or a note or memorandum in writing, within the Stat. of Frauds, must be shown. It must in general appear that the property passed; therefore where a machine is ordered to be made, the maker, having completed it, cannot sue for goods bargained and sold, if there be no appropriation of it, assented to by the buyer; *Atkinson v. Bell*, 8 B. & C. 277. So where goods in bulk are sold at so much per ton, an action for goods bargained and sold will not lie before they have been weighed; *per Littledale, J., Simmons v. Swift*, 5 B. & C. 865. If anything remains to be done on the part of the seller, until that is done the property is not changed, *per Bayley, J., S. C.* The general rule is "that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of those things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted"—(*Blackburn on Sales*, 152; *Jenner v. Smith*, L. R., 4 C. P. 270); but this rule is not to be taken to include cases where everything that remains to be done is to be done by the buyer, with full authority from the seller, but only those cases where something remains to be done by the seller; *Turley v. Bates*, 2 H. & C. 200; *S. C. sub nom. Furley v. Bates*, 33 L. J., Ex. 43; nor, where the intention is that the property should pass at the time of the sale. *Young v. Matthews*, L. R., 2 C. P. 127; *Martineau v. Kitching*, L. R., 7 Q. B. 436, 447, *per Cockburn, C.J.* The plaintiff, an artist, agreed "to finish three pictures for F. (the defendant), which are now submitted to him, in my best manner for 60*l.* and a clock." The pictures were not then completed, but afterwards the defendant expressed approval of them and said he would send for them: held to constitute sufficient appropriation of the pictures to support the common count for goods bargained and sold, and sold and delivered. *Girardot v. Fitzpatrick*, 21 L. T., N. S. 470, Mellor, J. Where acceptance of goods is conditional on something to be done by the seller, if the buyer prevents the possibility of the seller's fulfilling the condition, the contract is satisfied. *Mackay v. Dick*, 6 Ap. Ca. 251, D. P.

The plaintiffs in London sold to the defendants a quantity of butter, expected from Sligo, of specified quality and price. The butter was to be shipped for London in October, and paid for by bill at two months from the landing. The butter was not shipped till November; but the defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck on the passage, it was held that the property had passed to the defendants; and that they might be sued for goods bargained and sold, or, *per Park, J.*, for goods sold and delivered. *Alexander v. Gardner*, 1 N. C. 671. Where goods are destroyed, the question is not necessarily whether the property had passed, but at whose risk the

goods were; *Castle v. Playford*, L. R., 7 Ex. 98, Ex. Ch.; *Martineau v. Kitching*, L. R., 7 Q. B. 436, 455, 459; in such case, if the price was not ascertained prior to the destruction, it must be ascertained as nearly as possible, S. C. *Id.* As to when the property passes, see *post*, Action for conversion,—Evidence of property.

The cases of *Hagedorn v. Laing*, 6 Taunt. 166; *Lamond v. Davall*, 9 Q. B. 1030, have been cited in support of the proposition that the vendor cannot recover on this claim where, before action brought, he has re-sold the goods, and that he must sue for *not accepting*; see the judgment of the court in *Chinery v. Viall*, 5 H. & N. 288, 294; 29 L. J., Ex. 180, 184; as, however, the contracts in the cases above cited, contained a special clause allowing a re-sale they seem to be inapplicable. See *Accebal v. Levy*, 10 Bing. 376, 384. If, before actual delivery, the vendor re-sell specific goods sold, while the purchaser is in default, the re-sale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to resist paying the price. *Page v. Eduljee*, L. R., 1 P. C. 127, 145.

By Rules, 1883, O. xxi. r. 3, a defence in denial, must deny the order or contract, or the amount claimed.

ACTION FOR NOT DELIVERING GOODS.

In an action against the vendor of goods for not delivering them, the plaintiff may be called upon, by proper defences, to prove the contract and the breach, the performance of all conditions precedent on his part, and the amount of damages. Much of the matter under the last preceding head applies equally to this action.

Construction of the contract. Time, &c.] Where L. & Co., brokers, sold hemp by auction (described in the invoice as bought of "L. & Co."), and received part of the price, it was held that they had made themselves responsible as sellers, and that they could not defend themselves in an action for non-delivery, by evidence that they sold as agents only, and that the invoice had been made out in their names according to a local custom of brokers to secure the passing of the purchase money through their hands. *Jones v. Littledale*, 6 Ad. & E. 486. But where the invoice does not itself constitute a contract (as in fact it rarely does), but is only used to show that the defendant was the vendor of goods sold by a previous contract, the defendant may contradict it by showing that he was not the real vendor, and that his name was put in the invoice at the plaintiff's request. *Holding v. Elliott*, 5 H. & N. 117; 29 L. J., Ex. 134; and *per cur.*, an invoice is, generally, not *per se* a contract or any estoppel; S. C. An auctioneer may be liable for non-delivery of goods sold by him, although his principal's name appears on the conditions. *Woolfe v. Horne*, 2 Q. B. D. 355.

As to when stipulations as to time amount to a condition precedent, *vide ante*, p. 485. Where the contract was for the sale of sponge, to be paid for by ochre, at, &c., the value to be delivered on or before the 24th inst., in an action for not delivering the sponge, it was held that the delivery of the ochre on the 24th, was a condition precedent to the plaintiff's right of action. *Parker v. Rawlings*, 4 Bing. 280.

So where the defendant undertook to supply a steam-engine for a vessel of the plaintiff according to drawings and specifications of P. B., and the specification required its completion within two months; the court held that time was essential, and that an action lay for non-delivery within that time.

Wimshurst v. Dealey, 2 C. B. 253. But where the defendant has sold to plaintiff specific goods, to be taken and paid for at a certain time, and the plaintiff fails to pay at the end of that time, the defendant, though he retains a lien on them if in his possession, cannot re-sell them; but the plaintiff, on tendering the money at a subsequent day, will entitle himself to receive them. *Martindale v. Smith*, 1 Q. B. D. 389, and *Woolfe v. Horne*, 2 Q. B. D. 355; *Page v. Eduljee*, L. R., 1 P. C. 127, 145. So if there is a sale of goods to be delivered to the vendee "as required," it may be that he ought to require them within a reasonable time; but the vendor cannot rescind the contract till he has called on the vendee to require or take them, even though an unreasonable time has elapsed. *Jones v. Gibbons*, 8 Exch. 920; 22 L. J., Ex. 347.

Where a contract is to make and deliver goods "as soon as possible," there is at any rate an implied contract that the maker has all the necessary appliances ready for the manufacture. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, C. A.

An invitation to tender for supplying meat to a workhouse, specified that a written contract would be required to be signed upon acceptance of the tender: held that a written tender of the defendant, withdrawn by him after acceptance by the plaintiffs, was not a contract on which they could sue. *Kingston-on-Hull, Guardians of, v. Petch*, 10 Exch. 610; 24 L. J., Ex. 23. A contract to deliver 150 tons of girders by three deliveries of 50 each on certain days, according to drawings provided by the plaintiff, is one entire contract; and if the plaintiff does not supply drawings within a reasonable time, the defendant is under no obligation to deliver any girders. *Kingdom v. Cox*, 5 C. B. 522. The intention of the parties is to be looked at in the construction of all contracts; and the decision on one is seldom a guide to the construction of another. *Bannerman v. White*, 10 C. B., N. S. 844; 31 L. J., C. P. 28. See further the cases cited under the next heading.

Readiness to receive and to pay. In support of the averment that the plaintiff was ready and willing to accept the goods and to pay for the same, it will not be necessary to prove a tender of the money; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; and a demand of the goods is sufficient evidence that the plaintiff was ready and willing to pay; *Wilks v. Atkinson*, 1 Marsh. 412; *Levy v. Herbert, Ltd.*, 7 Taunt. 318; and this, though the demand may be by the plaintiff's servant. *Squier v. Hunt*, 3 Price, 68.

Where the agreement on a sale of straw was to pay "for each load of straw delivered on the premises," it was held that this imported payment for each load as delivered, and that on the purchaser refusing generally so to pay, the vendor was not bound to send any more. *Withers v. Reynolds*, 2 B. & Ad. 882; accord. *Bloomer v. Bernstein*, post, p. 489. But where goods are to be delivered by the defendant to the plaintiff in twelve equal monthly parcels, the refusal only, of the plaintiff to accept the first parcel does not exonerate the defendant from delivering the remaining parcels. *Simpson v. Crippin*, L. R., 8 Q. B. 14, following *Jonassohn v. Young*, and dissenting from *Hoare v. Rennie*, ante, p. 485. So, where the delivery was to be by two equal parcels, the defendant was held not to be released from the delivery of the second parcel, by reason that the plaintiff had refused to pay for the first in accordance with the contract. *Freeth v. Burr*, L. R., 9 C. P. 208. And where the delivery is to be by monthly quantities, the plaintiff can compel the defendant in a subsequent month to make up for short deliveries in the previous months, although the defendant had forborne to deliver the full quantities at the plaintiff's request. *Tyers v. Rosedale, &c. Iron Co.*, L. R., 10 Ex. 195, Ex. Ch. The result of the cases seems to be

that "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." *Freeth v. Burr*, L. R., 9 C. P. 213, *per* Coleridge, C.J.; *accord. Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. D. 648, C. A. See the observations of the C. A. in this case on *Honck v. Muller*, 7 Q. B. D. 92, C. A. Thus where the vendee becomes insolvent, and takes no steps to obtain delivery in performance of the contract, he practically gives notice to his creditors that he does not intend to perform his contract, and this, when assented to by the vendor, amounts to a rescission of the contract. *Ex pte. Chalmers*, L. R., 8 Ch. 289, followed in *Morgan v. Bain*, L. R., 10 C. P. 15. See also *Bloomer v. Bernstein*, L. R., 9 Q. B. 588, as to the questions to be left to the jury in such a case. But the insolvency must be an inability to pay, avowed either in act or word, and a consequent intention of the vendee not to pay his debts when due. *Ex pte. Carnforth Hematite Iron Co.* 4 Ch. D. 108. It is sufficiently avowed if the vendee file a petition for liquidation, and within a reasonable time, tender of the price in cash, is not made by the trustee appointed thereunder; *Ex pte. Stapleton*, 10 Ch. D. 586, C. A.; or, it seems, by his sub-vendee. S. C.

Non-delivery.] If the vendor is to deliver, but the contract does not (expressly or impliedly) provide where the delivery is to take place, as on board ship, he is not bound to deliver, or offer to deliver, till the place of delivery is notified by the vendee. *Armitage v. Insole*, 14 Q. B. 728. Where the contract does not provide for delivery by either party, the buyer is bound to fetch the goods; 2 Kent Com. 505; Pothier, *Cont. de Vente*, par. 52; and if a place of delivery is fixed by the contract, the vendee is not bound to accept elsewhere, nor the vendor to deliver elsewhere; *Id.* par. 51. Hops, when sold by the defendant to the plaintiff, were lying at a warehouse to the use of the defendant. The plaintiff paid for them and took away part from the warehouse with the consent of the warehouseman, but before he had carried away the rest, they were seized by a creditor of the defendant's vendor under a claim of right: held, that the plaintiff sue the defendant for non-delivery, although the letter had given no delivery order to the plaintiff. *Wood v. Tassell*, 6 Q. B. 234. In this case the warehouseman had, in fact, become the agent of the plaintiff, and it was not shown that the seizure was rightful. If it had appeared that the warehouseman had, from the first, refused to deliver on the order of the vendor, an action for non-delivery would have lain against the vendor. *Semb. Thöl v. Hinton*, 4 W. R. 26, M. T. 1855, Ex. If goods sold are in a carrier's hands, subject to lien, an action for non-delivery lies against the vendor, if the carrier refuses to deliver, on readiness by the buyer to pay charges thereon. *Buddle v. Green*, 27 L. J., Ex. 33. If, before the time of delivery, the vendor announce to the vendee his intention not to deliver, the latter may sue at once. *Roper v. Johnson*, L. R., 8 C. P. 167, following *Frost v. Knight*, L. R., 7 Ex. 111.

Damages.] Where goods are to be delivered at a future day, the damages for breach of contract are the difference between the contract price and the market price of the goods at the day when they ought to have been delivered. *Gainsford v. Carroll*, 2 B. & C. 624; *Valpy v. Oakeley*, *post*, p. 490; *Peterson v. Ayre*, 13 C. B. 353; *Josling v. Irvine*, 6 H. & N. 512; 30 L. J., Ex. 78; *Williams v. Reynolds*, 6 B. & S. 495, *post*, p. 491, and see *Wilson v. Lancashire, &c. Ry. Co.*, 9 C. B., N. S. 632; 30 L. J., C. P. 232. So, with respect to each period of delivery when more than one; *Brown v. Muller*, L. R., 7 Ex. 319; even though the action is commenced before the periods of delivery have elapsed; for the repudiation of the contract before the

time for its fulfilment goes to the question of breach, but does not affect the damages. *S. C.*; *Roper v. Johnson*, *ante*, p. 489. But where delivery was to be made between January and May, and on default the defendants to pay a fine per ton per week, it was held that the fine was to be computed from May until delivery actually was complete. *Bergheim v. Blaenavon Iron, &c. Co.*, *L. R.*, 10 Q. B. 319.

If no difference is proved between the contract and market prices the damages must be nominal. *Valpy v. Oakeley*, 16 Q. B. 941; 20 L. J., Q. B. 380. When the price has been paid, the measure of damages is the market price, without deducting the contract price; and this will be the rule where the payment is by bills which are still outstanding. But if the bills are dishonoured, even though after breach of the contract to deliver, the parties are placed in the same position as if the bills had never been given or the contract had been to pay in ready money; and the vendee can only recover the difference between the contract price and the market price of the goods. *S. C.*

If the buyer, at the request of the seller forbear to enforce the contract at the time the goods ought to be delivered, but afterwards do so, the measure of damages is the difference between the contract price and the market price when the buyer so enforces the contract, *e. g.*, by buying the goods in the market. *Ogle v. Vane, El.*, *L. R.*, 2 Q. B. 275; *Ex. Ch.*, *L. R.*, 3 Q. B. 272. See *Tyers v. Rosedale, &c. Iron Co.*, *L. R.*, 8 Ex. 305; *Ex. Ch.*, *L. R.*, 10 Ex. 195, where the postponement of delivery was at the request of the buyer. Where there has been a written contract, the vendee cannot enhance the damages by oral proof that the contract price was higher than the market price, by reason of the shortness of the time fixed by the contract for delivery. *Brady v. Oastler*, 3 H. & C. 112; 33 L. J., Ex. 300.

Where the goods delivered were of inferior quality to that contracted for, and plaintiff (vendee) had paid for them in advance, but objected to them when delivered and re-sold them at a reduced price, and the re-sale was within a reasonable time, the measure of damages, is the difference between the market price of goods of the quality contracted for at the date of delivery, and the re-sale price. *Loder v. Kekulé*, 3 C. B., N. S. 128; 27 L. J., C. P. 27.

If a ship is ordered to be made, or is left for repair and not delivered at the stipulated time, the measure of damages is *prima facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered. *Fletcher v. Tayleur*, 17 C. B. 21; 25 L. J., C. P. 65; *Ex pte. Cambrian S. Packet Co.*, *L. R.*, 4 Ch. 112, 117. See *Cory v. Thames Ironworks Co.*, *L. R.*, 3 Q. B. 181. So, where sets of waggon wheels and axles were to be made by the defendant according to patterns furnished by the plaintiffs, the jury may give damages for the loss of the use of the waggons. *Elbinger Actien-Gesellschaft v. Armstrong*, *L. R.*, 9 Q. B. 473. A. contracts to repair an engine for B. within a certain time; C. agrees to execute part of the work for A. within a less time, but *without any knowledge of the contract between A. and B.* C. fails to do his part within the time stipulated by him; A. cannot recover from C., as special damage, compensation made by A. to B. for the delay in the completion of A's contract occasioned by C's breach of contract; *Portman v. Middleton*, 4 C. B., N. S. 322; 27 L. J., C. P. 231; for this consequence could not have been contemplated by C. See also *Prior v. Wilkinson*, 8 W. R. 260, H. T. 1860, Q. B.; and *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., Q. B. 292; and other cases cited *post*, p. 577, *et seq.*, *Actions against carriers—Damages*. Defendant contracted to deliver a steam threshing-engine on a day fixed, at which time he knew the plaintiff would want to thresh his wheat. He failed to deliver it till six weeks after the day. He was held liable for

damage and expense occasioned by long exposure of the corn, kiln-drying, stacking, &c. ; but not to the loss caused by a fall in the market price of corn. *Smeed v. Foord*, 1 E. & E. 602 ; 28 L. J., Q. B. 178. So, where the defendant contracted with the plaintiffs to make for them a part of a machine which the plaintiffs, to the defendant's knowledge, had contracted to make for J. by a given time, and the defendant did not deliver according to his contract, so that the plaintiffs could not deliver the machine to J. by the given time, J. therefore rejected it : it was held that the plaintiffs might recover damages for the loss of profit on their contract with J., and for the expenditure uselessly incurred by them in making the rest of the machine. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, C. A. The above cases proceeded on the principle enunciated in *Hadley v. Baxendale*, 9 Exch. 341 ; 23 L. J., Ex. 179 ; that the damages recoverable are such as in the ordinary course of things arise from the breach itself, or such as may be reasonably supposed to have been in the contemplation of the parties, when making the contract, as the probable result of the breach. So, where there is no market for the goods, the damages must be measured by this rule. *Borries v. Hutchinson*, 18 C. B., N. S. 445 ; 34 L. J., C. P. 169 ; *Hinde v. Liddell*, L. R., 10 Q. B., 265 ; and see *Hughes v. Græme*, 33 L. J., Q. B. 335, 340 ; *Elbinger Actien-Gesellschaft v. Armstrong*, ante, p. 490. On a contract to sell cotton of a certain quality at a certain price, the buyer cannot recover for his loss of profit which he would have made by carrying out a re-sale, at a higher price, made in the interval between the contract and the time for delivery. *Williams v. Reynolds*, 6 B. & S. 495 ; 34 L. J., Q. B. 221 ; *Borries v. Hutchinson*, supra. But evidence of such re-sale may be admissible to show that there has been a rise in the market value. See *Engel v. Fitch*, L. R., 4 Q. B. 659, 667, Ex. Ch. The vendor cannot diminish the damages by giving previous notice to the purchaser of his intention not to deliver the goods. *Leigh v. Paterson*, 8 Taunt. 540 ; and see *Phillpotts v. Evans*, 5 M. & W. 475, ante, p. 482, and *Brown v. Muller*, L. R., 7 Ex. 319. On a contract for the sale of food or drugs, the plaintiff may, under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 28, cited ante, p. 442, in some cases recover special damages if goods of an inferior quality are delivered to him.

Where a commission agent A. purchases and ships goods for his principal B. inferior in quality to those ordered by B., B. can recover the actual loss only, which he has sustained, and not the difference between the price which the goods fetch, and what they would have fetched, if of the proper quality. *Cassaboglou v. Gibbs*, 9 Q. B. D. 220 ; 11 Q. B. D. 797, C. A.

Special finding of the jury at Nisi Prius.] By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 2, in actions in the superior courts, or any court of record, for breach of contract to deliver specific goods for a money price, on application of the plaintiff and by leave of the judge, the jury shall, if they find the plaintiff entitled to recover, find what are the goods which remain undelivered ; the sum which the plaintiff was liable to pay on delivery ; the damages sustained if the goods should be delivered under execution, and the damages if not so delivered ; and thereupon, if judgment be given for the plaintiff, the court, or any judge thereof, at their or his discretion and on application of the plaintiff, may order execution to issue for the delivery of the goods on payment of the sum found payable by the plaintiff, without giving the defendant the option of retaining the goods on payment of the damages assessed. It is believed that advantage has never yet been taken of this section. A writ of delivery is now issued and enforced under Rules, 1883, O. xlviii. r. 1.

Defence.

The defence arising under the Stat. of Frauds, must if relied on be specially pleaded. Rules, 1883, O. xix., r. 20, *ante*, p. 283.

Where goods sold under a contract required by the Stat. of Frauds to be in writing were to be delivered at a certain place or time, and the parties afterwards orally varied their stipulation, as to delivery, it was held that this did not amount to a rescission of the original contract. *Moore v. Campbell*, 10 Exch. 323; 23 L. J., Ex. 310; *Noble v. Ward*, L. R., 2 Ex. 135, Ex. Ch.; *vide ante*, p. 28; but if the goods had been actually accepted, or even a delivery order accepted under the agreement as so varied, that would have been a defence under a plea of accord; *semb.*, *Moore v. Campbell*, *supra*. Though a contract made in error may be avoided, yet the vendor cannot treat as void, at law or in equity, a sale to the vendee of an article misrepresented by the vendor in error, unless the vendee consents. *Semble*, *Scott v. Littledale*, 8 E. & B. 815; 27 L. J., Q. B. 201.

Where the defendant agreed to sell the plaintiff 200 tons of potatoes, part of a crop grown on certain land, which amount it would produce in an average year, but owing to a blight the land produced 80 tons only, it was held that the defendant was excused from the delivery of the remaining 120 tons by the perishing of the thing sold, without the defendant's default. *Howell v. Coupland*, L. R., 9 Q. B. 462; 1 Q. B. D. 258, C. A.

As to defence arising from the want of readiness in the plaintiff to accept, *vide ante*, pp. 488, 489. As to rescission of a contract before breach, see *post*, *Defences in actions on simple contracts—Rescission*. As to defence on the ground of the insolvency of the vendee, *vide post*, *Action for conversion of goods—Evidence of right of possession*.

ACTION FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action for goods sold and delivered must be in a condition to prove, if denied, 1. The contract of sale; 2. The delivery of goods according to contract; 3. The value or price.

The contract of sale.] As to contracts requiring a writing, the authorities will be found under the previous head of *Action for not accepting goods*, pp. 466, *et seq.*, and the general rule relating to sales is there stated. But the necessity of a writing under the Stat. of Frauds more rarely comes in question in this action, because the delivery, on which the action is founded, generally, though not necessarily, amounts also to a receipt and acceptance by the defendant. In general, proof of the delivery of the goods to, and receipt of them by, the defendant is *prima facie* evidence of the contract, and supercedes the proof of an order. *Bennett v. Henderson*, 2 Stark. 550. But this may, of course, be rebutted; as by proof that the defendant was in the habit of selling such goods for the plaintiff on commission. *Miller v. Newman*, 4 M. & Gr. 646. Defendant sent an order to A., who had meanwhile sold his business to B.; B. supplied goods to defendant, who consumed them, and was sued for them by B.; it was held, that the defendant, having a previous set-off against A., and having never contracted with B., nor had

been informed of B.'s position and ownership till after the goods had been consumed, so that they could not be returned or refused, the defendant was not liable on a contract express or implied. *Boulton v. Jones*, 2 H. & N. 564; 27 L. J., Ex. 117.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort, and sue on the implied contract. Thus, where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold. *Hill v. Perrott*, 3 Taunt. 274. Accord. *Abbotts v. Barry*, 2 B. & B. 369. But see B. N. P. 130; *Bennett v. Francis*, 2 B. & P. 554. So, where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered. *Biddle v. Levy*, 1 Stark. 20. Where the owner of property, which has been taken away by another, waives the tort, and seeks to raise an implied assumpsit, it is incumbent on him to show a title to the property; and mere possession is not sufficient. *Per Abbot, C.J., Lee v. Shore*, 1 B. & C. 94. A carrier misdelivered teas to the defendant of more value than the teas which he had really ordered. The defendant kept them in ignorance, and mixed and sold part. On the discovery of the error, defendant offered to pay the carrier for tea of the price really ordered: held, that this was some evidence of goods sold and delivered by the carrier to the defendant. *Coles v. Bulman*, 6 C. B. 184.

Where goods are lent, and if damaged to be taken by the bailee at a certain price, if they are damaged, an action for goods sold lies; *Bianchi v. Nash*, 1 M. & W. 545; so if goods are delivered on terms of approval or return, and they are retained an unreasonable time. *Beverley v. Lincoln Gas Co.*, 6 Ad. & E. 829; *Moss v. Sweet*, 16 Q. B. 493; 20 L. J., Q. B. 167; see also *Ray v. Barker*, 4 Ex. D. 279, C. A.; and the cases of *Lyons v. Barnes*, 2 Stark. 39, and *Iley v. Frankenstein*, 8 Scott, N. R. 839, probably misreported, are not law. But where they are destroyed without the fault of the bailee before the lapse of such reasonable time, no action lies against him. See *Elphick v. Barnes*, 5 C. P. D. 321, ante, p. 440.

The value of fixtures cannot be recovered under a claim for goods sold and delivered; *Lee v. Risdon*, 7 Taunt. 188; 2 Marsh. 495. But the value of trees, which the defendant has purchased and carried away, may be recovered under a claim for trees sold and delivered. *Bragg v. Cole*, 6 B. Moore, 114. The value of growing crops may be recovered on a claim for crops bargained and sold; *Parker v. Staniland*, 11 East, 362; and the value of crops, taken by an incoming from an outgoing tenant, may be recovered under a claim for goods sold; per Holroyd, J., in *Mayfield v. Wadsley*, 3 B. & C. 364. *Poulter v. Killingbeck*, 1 B. & P. 397. The price of railway shares may be recovered under a claim for "goods and chattels sold and delivered." *Lawton v. Hickman*, 9 Q. B. 563. A builder is not entitled to recover the value of the building materials employed by him in building a house for the defendant, under a claim for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322; nor can one who contracts to make and erect a steam-engine on the defendant's premises recover the contract price in this form. *Clark v. Bulmer*, 11 M. & W. 243; see *Atkinson v. Bell*, 8 B. & C. 277, 283, cited post, pp. 524, 525.

Where the contract was, that certain goods should be paid for partly in money and partly in buttons, Buller, J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially. *Harris v. Fowle*, cited 1 H. Bl. 287; *Talver v. West*, Holt, N. P. 179. But see *Hands v. Burton*, 9 East, 349. And generally, a contract of barter must

be declared upon as such, and the mere neglect or omission of the defendant to send *his* goods will not make it a contract of goods sold. *Harrison v. Luke*, 14 M. & W. 139. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that A. might recover for a horse sold and delivered. *Sheldon v. Cox*, 3 B. & C. 420. So, in an action to recover the value of a gun, for which the defendant was to give another gun and 15*l.* 15*s.*, *Ld. Ellenborough* held that, upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay its value in money. *Forsyth v. Jervis*, 1 Stark. 437; *accord. Ingram v. Shirley*, *Id.* 185.

An auctioneer may maintain an action in his own name against the buyer of goods sold and delivered by him in the course of his employment, though known to be the principal's, for he has possession, and an interest in respect of his lien, and is not a mere servant. *Williams v. Millington*, 1 H. Bl. 81. Therefore, payment to his employer is no answer to an action by the auctioneer. *Robinson v. Rutter*, 4 E. & B. 954; 24 L. J., Q. B. 250. But the auctioneer has only the same right as the party employing him to sell, and the defendant may therefore show that the rightful owner has claimed the value. *Dickenson v. Naul*, 4 B. & Ad. 638; see also *Grice v. Kenrick*, L. R., 5 Q. B. 340.

As to the power of corporations to sue and their liability to be sued on parcel sales of goods, *vide post*, Part III., *Actions by and against companies—Contracts by Corporations.*

Proof of delivery.] A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery. *Smith v. Chance*, 2 B. & A. 755. It has been contended (*Smith's Mercantile Law*, 9th ed., 497, n.) that facts constituting a delivery, sufficient to sustain an action for goods sold and delivered, ought also to constitute an acceptance and actual receipt under the Statute of Frauds, and *é converso*. It would perhaps have been convenient if this had been the established rule, but no such rule is to be deduced from the decided cases. There may be a delivery and receipt without "acceptance," though there can hardly be an "actual receipt" without a delivery, and the difficulty has rather been to determine what amounts to an acceptance, than what amounts to a delivery or receipt. The cases on the statute have been already digested at pp. 470, *et seq.* A delivery to a carrier may be enough to support this action, though not to dispense with a written contract; for he has no authority, as carrier, to accept; *Meredith v. Meigh*, 2 E. & B. 364, 373; 22 L. J., Q. B. 401, cited *ante*, p. 473. See also *Boulter v. Arnott*, 1 Cr. & M. 333, *per cur.* and *Curtis v. Pugh*, 10 Q. B. 114. So, an acceptance and receipt of part satisfies the statute as to the whole, but is not a delivery of the whole for the purpose of this action.

Where A. agreed to sell to B. certain goods, an earnest was paid, and the goods were packed in cloths furnished by B. and deposited in a building belonging to A., till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid,—it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered; for there must be a transfer of possession as well as property; *Goolall v. Skelton*, 2 H. Bl. 316; see *Simmons v. Swift*, 5 B. & C. 857. So where goods sold for ready money, were packed up in boxes of the vendee for him and in his presence, but remained at his request on the premises of the vendor, it was held that a count for goods sold and delivered would not lie. *Boulter v. Arnott*, *supra*. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a

specified time, and the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered; but if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods so delivered. *Oxendale v. Wetherell*, 9 B. & C. 386; *Shipton v. Casson*, 5 B. & C. 383.

If the delivery deviate from the mode pointed out by the buyer, yet if notice is sent to him and he does not repudiate it, he is liable; *Richardson v. Dunn*, 2 Q. B. 218. Sale and delivery by an agent of an intestate between the time of the death and grant of administration will support an action by the administrator, as such, for goods sold. *Foster v. Bates*, 12 M. & W. 226.

A symbolical delivery of goods, if sufficient to enable the vendee to take possession and to divest the seller's lien for the price, is a sufficient delivery; as the delivery of the key of the warehouse, or of a delivery order on a wharfinger, or of other *indicia* of property, so as to put it under the control of the vendee. See *Chaplin v. Rogers*, 1 East, 192, 194; *Elmore v. Stone*, 1 Taunt. 460. And this species of constructive delivery is particularly applicable to ponderous goods not capable of ordinary delivery, as timber; or which the vendor has not engaged to deliver in any other way. Where a ship, or goods at sea, are sold, the delivery is by delivery of the documentary proofs of title, as the bill of sale or lading, &c. 2 Kent's Comm. 500, 501. An order by seller, for delivery to defendant, of a rick of hay, made on a third person who has consented to let it remain on his land, is a sufficient delivery as between the seller and buyer, the latter having undertaken to carry it away himself. *Salter v. Woollams*, 2 M. & Gr. 650, 654. Other cases applicable to this head of constructive delivery will be found under the head of *Action for not accepting*, ante, p. 470, *et seq.*

To whom delivered—Carrier, agent, or servant.] Proof of a delivery to a third person, at the defendant's request, will support a count for goods sold and delivered to the defendant. *Bull v. Sibbs*, 8 T. R. 328. And where a purchaser orders goods to be sent by a carrier, though he does not name any particular one, or where that is the usual course of business between the plaintiff and defendant, a delivery to a carrier operates as a delivery to the purchaser; B. N. P. 36; *Dutton v. Solomonson*, 3 B. & P. 584; *King v. Meredith*, 2 Camp. 639; *Shepherd v. Harrison*, L. R., 5 H. L. 116, 127; or, on board ship with the bill of lading indorsed so as to make the goods deliverable to the vendee or his assigns; *Groning v. Mendham*, 5 M. & S. 189; *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401, cited ante, p. 473. But, delivery on board ship is not a delivery to the vendee, if the bill of lading be for delivery to order of the consignor or his assigns, and the consignor does not indorse it to the vendee. *Wait v. Baker*, 2 Exch. 1. See *Gabarron v. Kreeft*, L. R., 10 Ex. 274; *Ogg v. Shuter*, 1 C. P. D. 47, C. A. But, though the bill of lading be to the consignor's order, if it be indorsed at the time of shipment to the consignee's order, the property passes, and the consignee must pay for the goods, though lost on the voyage; especially since the Act 18 & 19 Vict., c. 111, ante, p. 428; *Brown v. Hare*, 3 H. & N. 484; 27 L. J., Ex. 372; 4 H. & N. 822; 29 L. J., Ex. 6, Ex. Ch. See *Shepherd v. Harrison*, supra, cited ante, p. 417. Where the written contract required by the Stat. of Frauds, s. 17, provides that the goods shall be sent by a particular route, and they are sent by another route, it may be shown that the buyer ratified this change of route, and such ratification need not

be in writing. *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140; and see *Hickman v. Haynes*, L. R., 10 C. P. 598.

The master of a ship has a general authority to bind the shipowner for goods sold or money lent; but in an action by the creditor against the owner the plaintiff must show that they were necessities. *Mackintosh v. Mitcheson*, 4 Exch. 175. See further, as to liability of shipowner on contracts of the master, *post*, pp. 525, 526.

The members of a club managed by a committee are not, merely as such, personally liable for goods supplied on the order of the committee for the use of the club; it appearing that the committee are supplied with funds by the members, who are subject only to annual subscriptions, and to other ready money payments, and that the committee has no express authority to bind the members by contracts. *Fleming v. Hector*, 2 M. & W. 172. And it seems that such committees are not generally authorised to deal on credit; therefore the person who supplies goods on credit can only sue those members of the committee who were privy to the contract, unless he can prove that such dealing was in furtherance of the purposes for which the committee was appointed. *Todd v. Emly*, 7 M. & W. 427; *In re London Marine Assur. Assoc.*, L. R., 8 Eq. 176. Nor are the members of the committee liable, as such, on the contract of their servant, the house steward, unless there be some proof of an authority from them. *Todd v. Emly*, 8 M. & W. 505. But where the secretary of a club, for supply of coals to each member, was authorised to deal on credit with the coal merchant, each member was held liable though there existed particular rules of the club for collecting and paying over the money from its members. *Cockerell v. Aucompte*, 2 C. B., N. S. 440; 26 L. J., C. P. 194.

A master is not responsible for goods ordered by his servant in his name, but without his authority, unless he accepts and adopts them, or has accredited the servant by paying for goods so ordered before. *Maunder v. Conyers*, 2 Stark. 281; *Pearce v. Rogers*, 3 Esp. 214. And, when the master has been always used to give his servant money to pay for commodities as he buys them, and the servant buys them without paying, and embezzles the money, the master is not liable. *Stubbing v. Heintz*, Peake, 47; *Anon.*, 1 Show. 95. But, if even in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the same servant subsequently orders, until the authority is distinctly withdrawn by notice; *Hazard v. Treadwell*, 1 Stra. 506; *Rusby v. Scarlett*, 5 Esp. 76; *Anon.*, *supra*; and see *Gilman v. Robinson*, Ry. & M. 226; *Filmer v. Lynn*, 4 Nev. & M. 559; *post*, p. 508; though he has given the servant money to pay for the goods in some instances. *Wayland's case*, 3 Salk. 234; *Bolton v. Hilleraden*, *Ibid.*; 1 Ld. Raym. 225; *Rusby v. Scarlett*, *supra*.

Where the contract has been made with an agent, and delivery to him, the seller may in some cases resort to the principal. As to suing the principal on a sale to his agent, the following cases are important. Where the principal is unnamed or unknown at the time of sale, the following has been laid down as the rule—"If a person sells goods supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing

with him and him alone, then, according to the cases of *Addison v. Gandassequi*, 4 Taunt. 574, and *Paterson v. Gandassequi*, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal; having once made his election, at the time when he had the power of choosing between the one and the other." *Thomson v. Davenport*, 9 B. & C. 78, 86, *per* Ld. Tenterden, C. J. The seller who has given credit to an agent believing him to be the principal, cannot recover against the undisclosed principal, if the latter has *bond fide* paid the agent, when the vendor still gave credit to the agent, and knew of no one else as principal. *Armstrong v. Stokes*, L. R., 7 Q. B. 598. See, however, the observations of the C. A. on this case in *Irvine v. Watson*, *infra*. The knowledge at the time of the contract that there is a principal, his name not being disclosed, does not enable the seller to make his election, and will not prevent him, although he has debited the agent, from afterwards resorting to the principal; *Thomson v. Davenport*, *supra*; even although the principal has in the meantime *bond fide* paid the agent, unless there has been conduct on the part of the seller which has misled the principal into the belief that the agent had already settled with the seller, and the payment was made in consequence of such belief. *Irvine v. Watson*, 5 Q. B. D. 414, C. A.; *Davison v. Donaldson*, 9 Q. B. D. 623, C. A. Mere delay in enforcing payment from the agent is not sufficient. S. C. The fact of the principal's name being disclosed at the time of the sale, does not, until the seller has elected to charge the agent, prevent his resorting to the principal; such disclosure merely enables the seller to charge the principal in the first instance, if he so desire. *Calder v. Dobell*, L. R., 6 C. P. 486, Ex. Ch. A., as agent of the defendant, a foreign merchant, bought goods of the plaintiff, and the plaintiff made out invoices describing them as bought by A. "on account of" the defendant, and drew for the amount on A., who accepted; the defendant remitted the amount to A. to meet the acceptances, but A. became insolvent before they were due: held that defendant was not liable. *Smyth v. Anderson*, 7 C. B. 21. When the seller elects to sue an undisclosed principal, it is a good defence if the defendant show that he has paid his agent; S. C.; and the books of the seller cannot be admitted as evidence for him that he always debited the principal. S. C. And it is now clearly established, that where an agent contracts on behalf of a foreign principal, whether disclosed or not, he has, in the absence of express authority to that effect, no authority to pledge his principal's credit, or to establish privity between him and the person in this country entering into the contract, and the agent alone is liable thereon. *Armstrong v. Stokes*, L. R., 7 Q. B. 605, *per cur.*; *Ireland v. Livingston*, L. R., 5 H. L. 408, *per* Blackburn, J.; *Elbinger Actien Gesellschaft v. Claye*, L. R., 8 Q. B. 313; *Hutton v. Bulloch*, Id. 331, Ex. Ch.; L. R., 9 Q. B. 572. See also *New Zealand Land Co. v. Watson*, 7 Q. B. D. 374, C. A.; *Kaltenbach v. Lewis*, 24 Ch. D. 54, C. A., and *Maspons v. Mildred*, 9 Q. B. D. 530, C. A.; 8 Ap. Ca. 874, D. P., *cited post*, p. 539. Where the seller has sued the agent to judgment, he cannot, although he has not received satisfaction, afterwards proceed against the seller. *Priestly v. Fernie*, 3 H. & C. 977; 34 L. J., Ex. 172. But, mere proof in bankruptcy against the estate of the agent will not amount to a binding election. *Curtis v. Williamson*, L. R., 10 Q. B. 57. Where the contract is in writing, signed by the agent in his name, the result of the authorities seems to be, that oral evidence is admissible to charge the undisclosed principal, but not to discharge the agent. See *ante*, p. 25, and notes to *Thomson v. Davenport*, 2 Smith's Lead. Cas., 8th ed., 404, *et seq.*, and the cases there cited. It may be shown that a party professing to be acting as agent is the real principal, and he will be then liable to be sued

as such. See *Carr v. Jackson*, 7 Exch. 382; 21 L. J., Ex. 137. So, if the principal for whom the agent professes to act does not at the time exist, the latter is liable. *Kelner v. Baxter*, L. R., 2 C. P. 174, cited *post*, p. 504.

Where the defendant A. gave authority to his wife B. to order goods from the plaintiff C., on which authority B. acted: A. was held liable for goods ordered by B. of C. after A. had become insane, C. having no notice of such insanity. *Drew v. Nunn*, 4 Q. B. D. 661, C. A.

Meat was supplied to the defendant during the lifetime of her husband, by his authority, for the support of her and her family: it was held that the defendant was not liable for the price of the meat so supplied, after the death of the husband on a distant voyage, before news of the death came to hand. *Smout v. Ilbery*, 10 M. & W. 1.

Delivery to partner.] For definitions of partnership, see *Pooley v. Driver*, 5 Ch. D. 458, 471, *et seq.* Each partner is presumably an agent for the rest, to bind them by simple contracts relating to the business of the firm. Therefore, goods delivered in pursuance of an order by one, are delivered to all, unless it appear that they were delivered on the exclusive credit of one only; but debiting one only, and taking the separate acceptance of that one, is not decisive of this. *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 28 L. J., C. P. 110; *Keay v. Fenwick*, 1 C. P. D. 745, C. A. A question sometimes arises in such actions, whether all the defendants are liable as partners. Although the defendant cannot compel the joinder of a dormant partner as co-defendant, yet the dormant partner *may*, at the option of the plaintiff, be so joined. *Lloyd v. Archbottle*, 2 Taunt. 327; *Ruppell v. Roberts*, 4 Nev. & M. 31. And such a partner may be joined as defendant, though the contract, which was in writing (not under seal) and *inter partes*, did not name him. *Drake v. Beckham*, 11 M. & W. 315, Ex. Ch. Though a partnership is constituted by deed, it may be proved by parol evidence. An examined copy of an answer in Chancery by two of the defendants, to a bill of a third defendant, charging them as partners and praying for an account, is good evidence to prove the partnership as against the persons so answering. *Studdy v. Sanders*, 2 D. & Ry. 347. Proof that the defendants suffered their names to be used as partners will be sufficient. See 1 Smith's Lead. Cases, notes to *Waugh v. Carver*. If it can be proved that the defendant has held himself out to be a partner,—not “to the world,” for that is a loose expression,—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he is liable to the plaintiff, in all transactions in which the plaintiff gave credit to the defendant, upon the faith of his being such a partner. *Per Parke, J., Dickinson v. Valpy*, 10 B. & C. 140. Though parties are not really partners in trade, yet if one so represents himself, and thereby gets credit for goods for the other, both are liable. *Per Ld. Kenyon, C. J., De Berkum v. Smith*, 1 Esp. 29. Where the defendant, who was not a partner had held himself out as such, and statements had been made by one of the firm that the defendant was a partner, this will not make the defendant liable, as an ostensible partner, to plaintiffs who had not heard of the statements, nor supplied the goods on the faith of the defendant being a partner. *Edmundson v. Thompson*, 31 L. J., Ex. 207. If the name of a clerk be used in a firm with his own consent, he is liable to third persons as a partner, though he receives no part of the profits. *Guidon v. Robson*, 2 Camp. 304. So, where the defendant, having advanced money to a person who was getting up a mining company, on the security of 200 shares, permitted the captain of the mine to represent, without naming the defendant, that the mine was being worked by a person of substance, and

the plaintiff on the faith of these representations supplied goods, it was held that he could recover against the defendant as a partner in the mine. *Martyn v. Gray*, 14 C. B., N. S. 824.

Persons may be partners in a particular concern or business, yet, if they do not hold themselves out as general partners, it will not make them liable in other cases not connected with that business. *De Berkom v. Smith*, ante, p. 498. But as to that particular concern, they are partners so as to bind one another by contracts for carrying it out. *Heyhoe v. Burge*, 9 C. B. 431; 19 L. J., C. P. 243. Where the publisher, editor, and printer agree to share the profits of a periodical work equally, and the printer is to furnish paper at cost price, the stationer, who supplied the printer with paper, cannot sue either publisher or editor as partners. *Wilson v. Whitehead*, 10 M. & W. 503. If there is a stipulation between apparent partners, that one of them shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of the stipulation. *Alderson v. Pope*, 1 Camp. 404, n. The plaintiff must show that the name of the defendant was used in the firm with his own consent. *Newsome v. Coles*, 2 Camp. 617; 2 H. Bl., 4th edit. 235, n. Where a person allows his name to remain in a firm, either exposed publicly over a shop door, or used in printed invoices or bills of parcels, or published in advertisements, this precludes him from disputing his liability as a partner. *Per Tindal, C. J.*; *Fox v. Clifton*, 6 Bing. 794. If a firm, consisting of several, carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing the firm; *S. Carolina Bank v. Case*, 8 B. & C. 427; *Vere v. Ashby*, 10 B. & C. 293, per Parke, J.; unless it be proved that the act was done by that partner, on his own behalf alone, and not on behalf of the firm. *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109, C. A., ante, p. 332.

The liability of a person, as partner, whether called one or not, may also be proved by showing that he participated in the profits of the concern; and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner, carrying on trade for the benefit of the estate, are liable personally as partners. *Wrightman v. Townroe*, 1 M. & S. 412. However small the stipulated portion of profits, the participation renders the party liable to all the engagements of the partnership. *R. v. Dodd*, 9 East, 527. And this, whether the plaintiff knew or not, at the time of his dealing with the concern, that the person whom he charges as a partner participated in the profits. *Ex pte. Gellar*, 1 Rose, 297; *Vere v. Ashby*, supra; *Edmunds v. Bushell*, L. R., 1. Q. B. 97.

The participation, to render the party liable, must be in the profits as such. Therefore, a remuneration made to a traveller, or other agent, by a portion of the sums received by, or for his principal in lieu of a fixed salary, is only a mode of payment adapted to secure exertion, and does not render the agent a partner. *Cheap v. Cramond*, 4 B. & A. 670. So, a person employed as superintendent-engineer of another's steamship, at a yearly salary, and, in addition, a sum equivalent to 10 per cent. on the net profits, is not a partner. *Harrington v. Churchward*, 29 L. J., Ch. 521. So a person employed to sell goods, and who was to have for himself whatever he could procure for them above a stated sum, was held not to be a partner. *Benjamin v. Porteus*, 2 H. Bl. 590. So, in an agreement between the owner of a lighter and B., that B., in consideration of working the lighter, shall have half the gross earnings, is only a mode of paying wages, and not a partnership in the profits. *Dry v. Boswell*, 1 Camp. 329; *Lyon v. Knowles*, 3 B. & S. 556; 32 L. J., Q. B. 71; 5 B. & S. 756, Ex. Ch. So an agreement, that a sailor shall receive a certain share of the produce of the voyage in lieu of wages, does not make him a partner with the owners of the cargo. *Wilkinson v. Fraser*, 4 Esp.

182; *Mair v. Glennie*, 4 M. & S. 244. So, where a patentee grants an exclusive licence to work it to other persons, who engage to employ him as manager at a salary equal to 40 per cent. on the net proceeds of the business. *Stocker v. Brockelbank*, 3 Mac. & G. 250; 20 L. J., Ch. 401. So, the receipt of a percentage on the gross amount of sales to persons recommended by A. does not make him a partner of the seller. *Pott v. Eytton*, 3 C. B. 32. But where a retiring proprietor of a newspaper guaranteed the purchaser of it a certain profit, stipulating for the surplus profit for a certain number of years in a certain event, he was held to be a partner. *Barry v. Neaham*, 3 C. B. 641. An agreement between two persons, that one shall make purchases of goods for the other, and in lieu of brokerage shall have one-third of the profits of the sales, and bear a certain proportion of the losses, would make him liable as a partner as to third persons. *Per Holroyd, J., Smith v. Watson*, 2 B. & C. 409. A distinction is recognised between receiving a share of the profits, which renders the person liable as partner, and relying on the profits as a fund for payment, which will not have that effect. See *Grace v. Smith*, 2 W. Bl. 998; *Expte. Humper*, 17 Ves. 404; *Lyon v. Knowles*, ante, p. 499, 2 H. Bl., 4th ed. 236; and *Mollwo v. Court of Wards*, infra.

The proof of partnership by a mere perception of the profits of a business has been much narrowed by recent decisions, and it is now settled that such perception may be shown, by the circumstances, not to give rise to a partnership. Two persons, who carried on business as iron-smelters, in partnership, compounded with their creditors by means of a composition deed, conveying the partnership property to trustees, to carry on the business under the name of a company, and to divide the net profits annually among the creditors of the partnership; it was held, that a creditor who had executed the deed, was not liable as a partner for debts contracted by the trustees in carrying on the trade. *Cox v. Hickman*, 9 C. B., N. S. 47; 8 H. L. C. 268; 30 L. J., C. P. 125. The proper test of liability, as a partner of a person not ostensibly a partner, is not merely whether the person sought to be charged has stipulated for participation in the profits, as such, but whether the person, by whom the trade was actually carried on, carried it on as agent for the other. S. C.; *In re English, etc. Assur. Society*, 1 H. & M. 85; *Kilshaw v. Jukes*, 3 B. & S. 847; 32 L. J., Q. B. 217; *Bullen v. Sharp*, L. R., 1 C. P. 86, Ex. Ch.; *Holme v. Hammond*, *Mollwo v. Court of Wards*, and *Expte. Tennant*, infra. See also on these cases, *Pooley v. Driver*, 5 Ch. D. 458.

Where, under the provisions of a partnership deed between A., B., and C., the defendants, the executors of a deceased partner, A., after his death took the share in the business to which A. would have been entitled, if living, but did not interfere therein; it was held that they were not liable to third persons on contracts made with B. and C. after A.'s death. *Holme v. Hammond*, L. R., 7 Ex. 218. So, where a firm being indebted to a Rajah, it was agreed that the business of the firm should be carried on, subject to his control, that he should receive 20 per cent. commission on all profits made by the firm, till the debt due should be paid, and 12 per cent. interest on cash advances made by him to the firm; and he was accordingly afterwards credited with proceeds of the business in the books of the firm, though he never received the same, nor did he hold himself out as an ostensible partner in the firm; it was held that the primary object of the agreement, being a security to the Rajah for the debt and advances, and there being no intention of creating a partnership between the parties, the Rajah was not liable to third persons on contracts made by the firm. *Mollwo v. Court of Wards*, L. R., 4 P. C. 419; accord. *Expte. Tennant*, 6 Ch. D. 303, C. A.

By Bovill's Act (28 & 29 Vict. c. 86), s. 1, the advance of money by way of loan upon a contract in writing that the lender shall receive interest vary-

ing with the profits or the business of the borrower, or a share of the profits, is not of itself to make the lender a partner, or make him responsible as such. By sect. 2, a contract for remuneration of a servant or agent by a share in the profits of the employer's business, is not, of itself, to make the servant or agent responsible as a partner, nor give him the rights of a partner. By sect. 3, the widow or child of the deceased partner of a trader, receiving as an annuity, a portion of the profits of the business is not, by reason only of such receipt, to be deemed a partner of, or subject to liabilities incurred by such trader. And by sect. 4, a person selling the good-will of the business, and receiving in return, by way of annuity or otherwise, a portion of the profits, is not, by reason only, of such receipt to be deemed a partner, nor subject to the liabilities of the person carrying on the business.

It seems very doubtful if this statute has produced any alteration in the law as settled by the above recent cases. See *Holme v. Hammond*, *ante*, p. 500; *Pooley v. Driver*, 5 Ch. D. 458, 483. The only effect that can be suggested for the statute to have is, that as regards the protected classes, the sharing in profits shall be no evidence at all of a contract of partnership, whereas with regard to others it is evidence, though insufficient of itself to establish the liability. *Holme v. Hammond*, L. R., 7 Ex. 227, *per Kelly*, C. B.

An unsigned contract is not within sect. 1. *Pooley v. Driver*, *supra*. The advance must be by way of loan; S. C.; *Ex pte. Delhasse*, 7 Ch. D. 511, C. A.; *Syers v. Syers*, 1 Ap. Ca. 174, D. P.; and it must appear to be so, on the face of the contract. S. C. Where from the agreement it appears that the nominal lender is a partner, a declaration that the loan is made under the act, and that the lender shall not be a partner, will not prevent his being a partner. *Ex pte. Delhasse*, *supra*. The act applies only to a loan on the personal responsibility of the trader to whom it is made, and not to a loan made on the security of his business. S. C. See also on this statute, *Ex pte. Mills*, L. R., 8 Ch. 569; *Ex pte. Taylor*, 12 Ch. D. 366, C. A.

A partner is not liable on a contract made before he became such; as, for goods delivered after he became partner on an order given before. *Beale v. Moulds*, 10 Q. B. 976; *Battley v. Lewis*, 1 M. & Gr. 155. And this is the rule, though the partnership may have been made retrospective by agreement between the new and old partners. *Vere v. Ashby*, 10 B. & C. 288.

With reference to liability for the price of goods, ordered by a firm after the retirement of a partner, "the law stands thus: if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient for all but actual customers; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation as to all such persons as if the existence of the partnership had been notorious." *Farrar v. Definne*, 1 Car. & K. 580, *per Cresswell*, J. The rule as to dormant partners is laid down to the same effect in *Carter v. Whalley*, 1 B. & Ad. 11. If a partner retires from a firm which has dealings with a banking company formed under 7 Geo. 4, c. 46, the fact that a shareholder in the bank, who is also a director of it (but not a manager), happens to be one of the firm, is not *constructive notice* of the dissolution of partnership so as to protect the retired partner from future liability to the bank. *Powles v. Page*, 3 C. B. 16.

Of two partners A. and B., A. retired, and B. carried on business with C. as partner under the same style; a customer of the old firm who sold goods

to the new firm after the change of partners, but without notice of it, is put to his election, whether he will sue A. and B. for the price, on a liability by estoppel, or B. and C. on a liability in fact. *Scarf v. Jardine*, 7 Ap. Ca. 345, D. P. If after notice of A.'s retirement he sue B. and C., or prove in their liquidation, he cannot afterwards sue A. S. C.

If a creditor, knowing of a dissolution of partnership, transfers his account from the old to the new firm, and continues to deal with the new firm, this is evidence of accepting that firm as his debtors, and will release a retiring partner. *Hart v. Alexander*, 2 M. & W. 484; *Rolfe v. Flower*, L. R., 1 P. C. 27. So where the creditor receives interest from the new firm on the debt due from the old. *Bilborough v. Holmes*, 5 Ch. D. 255. See also *Kirwan v. Kirwan*, 2 Cr. & M. 617; *Ex pte. Gibson*, L. R., 4 Ch. 662.

The authority of a partner to bind the firm being that of a presumed agency, a question may arise how far this agency can be determined, or excluded, by timely notice to the vendor or other creditor, from another member of the firm, disclaiming the act or order of his partner. The general question as to the effect of such notice has not, it is believed, been settled. It has, however, been said that mere notice to, or knowledge of, the creditor of any arrangement between the partners respecting the non-liability, or the restricted liability of any of them, will not affect the creditor's right to hold all, or any, of the partners liable, though the notice was before the contract. *Ex pte. Greenwood*, 3 D. M. & G. 459; 23 L. J., Ch. 966. But it has been repeatedly ruled, so far as relates to the power of binding a firm by negotiable securities, that a partner is not liable after notice to the person taking the security. *Gallway, Ltd. v. Mathew*, 10 East, 264; *Rooth v. Quin*, 7 Price, 193; and see generally *Story on Partnership*, sect. 123; 3 Kent's Com. pp. 44, 45, and the cases cited, *ante*, p. 331, *et seq.* In cases where the majority can bind the rest of the partnership, it is questionable whether such notice or disclaimer can have any operation at all. See *Story and Kent, ubi supra*.

A creditor of a partnership may prove his debt against the estate of a deceased partner; or, as it is sometimes expressed, the debt is several as well as joint: during the lifetime of the partners it is, however, joint only, and a judgment recovered against one partner bars the remedy against the others. *Kendall v. Hamilton*, 3 C. P. D. 403, C. A.; 4 Ap. Ca. 504, D. P.

Delivery to an unincorporated mining company.] Working mines is a species of trade, and has some of the qualities of an ordinary partnership. Mines within the stannaries of Devon and Cornwall are often worked by unincorporated partnerships, with transferable shares, on what is termed the "cost-book" principle. *Vide ante*, pp. 80, 255.

The shareholders in an ordinary mining company, conducted by managers or other agents, are personally liable on the contracts made for the supply of the mines, where such contracts are necessary or usual, or where the defendants can be shown to have authorised the contracts. *Tredwen v. Bourne*, 6 M. & W. 461; *Steigenberger v. Carr*, 3 M. & Gr. 191. And such shareholders are for this purpose partners, and therefore liable on all usual contracts for goods supplied, &c., made by their agents, though there may be an agreement *inter se* not to deal on credit; unless the plaintiff knew of the restriction, and that the goods were ordered without the authority of the shareholder sued. *Hawken v. Bourne*, 8 M. & W. 703. The defendant may be charged as partner on proof of an admission of his interest either before or after the debt was incurred, without proving a deed of co-partnership or any strict legal interest in the mine; *Ralph v. Harvey*, 1 Q. B. 845; or by proof that he acted as partner; *Owen v. Van Uster*, 10 C. B. 318; 20 L. J., C. P. 61; unless the admission be shown to have been made under error. *Vice*

v. *Anson*, 7 B. & C. 409, 411. The defendant's interest may be proved by his acceptance of the shares in a mine, written at the foot of a certificate of transfer by the seller, although it be not stamped as a transfer; but if the document does not itself convey any legal interest, the admission of the defendant is not *conclusive* proof. *Toll v. Lee*, 4 Exch. 230. See *ante*, p. 256, as to stamp duty; and as to evidence of transfer, see *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Ex. 53, cited *ante*, p. 286. Attendance of the defendant at a meeting in the character of a shareholder is evidence that he is one. *Harrison v. Heathorn*, 6 M. & Gr. 81. Where the facts showed that the defendant became a shareholder on the terms that the directors should not proceed without a certain capital, and they proceeded (without the defendant's assent) before that capital was raised, the defendant was held not liable on their contract. *Pitchford v. Davis*, 5 M. & W. 2. But the non-performance of this condition by the directors will not prevent the liability of a shareholder from attaching, where he sanctions the contract either directly or by acquiescing in the working. *Steigenberger v. Carr*, *ante*, p. 502.

Delivery to members of an inchoate company.] A joint-stock company is in the nature of a partnership; but the constitution of such companies generally distinguishes them from ordinary partnerships. When incorporated, the direct liability of individual members ceases. When inchoate, or not incorporated, the liability of a member depends on his being actually or constructively a party to the contract on which the plaintiff sues. In such cases the questions to be considered are:—Was the defendant directly a party to the contract? Was he a member of the body which contracted? Did he hold himself out as a partner by acting, or permitting others to act, in such a way as reasonably to induce the plaintiff to believe that he was a partner, and responsible as such? Had he legally withdrawn from the concern at the time of the contract? See *Wood v. Argyle*, *Dk. of*, 6 M. & Gr. 928; *Lake v. Id.*, 6 Q. B. 477; *Fox v. Clifton*, 6 Bing. 792 (cited *post*, p. 504); *Bright v. Hutton*, 3 H. L. C. 341. The question that most frequently presents itself, is the liability of persons who have become subscribers to a company projected, but not finally established.

When the defendants consented to be directors of a water company and attended meetings, and were privy to an order given to the plaintiff (an engineer), though not actually present when the order was given, they were held liable, notwithstanding the subsequent failure of the project. *Double-day v. Muskett*, 7 Bing. 110. See *Collingwood v. Berkeley*, 15 C. B., N. S. 145. But the mere consent of the defendant to become a member of the provisional committee of an intended company, and the insertion, with his authority, of his name in a prospectus accordingly, will not *per se*, and without further privity, make him liable on orders given by other members of the committee, or by the secretary, or the solicitor of the company. *Reynell v. Lewis*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 946; *Cooke v. Tonkin*, 9 Q. B. 936; *Bailey v. Macaulay*, 13 Q. B. 815; *Burbidge v. Morris*, 3 H. & C. 664; 34 L. J., Ex. 131. The facts of the case may, however, warrant a judge in leaving them to the jury, as evidence that the defendant had authorized the contract to be made, either by his co-provisional committeemen, or by the managers of the concern, i.e. by the managing committee, if any, or the majority of them, or by the solicitor or other officer of the company; and the terms of the printed prospectus, if circulated with the defendant's privity and consent, and known, or presumably known, to the plaintiff, may be sufficient to justify such inference. *Semb. per cur.*, in *Reynell v. Lewis*, *supra*; *Maddick v. Marshall*, 16 C. B., N. S. 387; 17 C. B., N. S. 829, Ex. Ch.; *Riley v. Packington*, L. R., 2 C. P. 536; and see

Bailey v. Macaulay, ante, p. 503. But a managing committee, appointed by the provisional committee, are not *therefore* agents of the latter for the purpose of pledging their credit by contracts. *Williams v. Pigott*, 2 Exch. 201. Where the defendant, as one of an acting committee, assented to the contract with the plaintiff, it was held a proper question for the jury whether the contract was on the personal liability of the defendant, either alone or as a committeeman, or on the sole credit of the funds. If on the credit of the funds, the contract becomes absolute on receipt of funds, and may be enforced. *Higgins v. Hopkins*, 3 Exch. 163. A minute in the books of an incorporated railway company appointing the plaintiff their engineer, not authenticated by any signature, or by any proof *aliunde* that a board meeting was held on the day, or that the defendant, a provisional committeeman, had sanctioned the resolution, is not *per se* evidence to fix the defendant; nor is a letter of the secretary to the plaintiff, stating the minute, admissible against the defendant without some proof of his authority to write it. *Rennie v. Wynn*, 4 Exch. 691.

Where the defendants, as agents on behalf of a proposed company, entered into a written contract with the plaintiff for the supply of goods to the company, which was not then constituted, it was held that, as the defendants had no existing principal, they were personally liable, and that a subsequent ratification by the company, when formed, could not relieve them from this responsibility, as the company was a stranger to the contract. *Kelner v. Baxter*, L. R., 2 C. P. 174. See also *Scott v. Ebury*, *Id.*, 255; *Hopcroft v. Parker*, 16 L. T., N. S. 561, E. T. 1867, C. P.; *Melhado v. Porto Alegre Ry. Co.*, L. R., 9 C. P., 505, and other cases, cited *post*, p. 523. Part III., *Actions by and against Companies*.

A person who applies for shares in a joint-stock company, and pays a deposit on them, but has not otherwise interfered in the concern, is not therefore liable on contracts made by a board of directors, who have taken upon themselves to act before the necessary capital has been raised, agreeably to the prospectus, and after the shares have been declared forfeited by reason of non-payment of subsequent calls. *Fox v. Clifton*, 6 Bing. 776. See *Hovbeach Coal Co. v. Teague*, 5 H. & N. 151; 29 L. J., Ex. 137, cited *post*, under *Actions by companies*, Part III., and *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; 32 L. J., Ex. 190.

Some of the cases belonging to this head have already been mentioned under the last head of *Delivery to partner* (ante, p. 498, *et seq.*), such companies having formerly been treated as partnerships, and so called. In *Reynell v. Lewis*, ante, p. 503, it is denied that associations of this kind (at least, so long as they are *in fieri*) are partnerships at all.

As to actions against incorporated or registered companies, *vide post*, Part III., *Actions by and against companies*.

Delivery to wife.] Where a husband gives his wife express authority to pledge his credit, he is liable for the price of goods delivered on such credit, as in the case of any other agent; as to which, *vide ante*, p. 495, *et seq.* Under the present head is considered the authority of the wife to pledge her husband's credit, to be implied from the mutual relation of the parties, in the absence of such express authority. Where a husband is living in the same house with his wife, he is liable for any goods which he permits her to receive there. If they are not cohabiting, then the husband is in general only liable for such necessities as, from his situation in life, it is his duty to supply to her. *Waithman v. Wakefield*, 1 Camp. 121; *Atkins v. Curwood*, 7 C. & P. 756. The question of the husband's liability must, therefore, be considered separately in the cases where his wife is, and is not living with him, and the latter cases must be further distinguished with

reference to the cause of the wife's separation from her husband. These questions are fully discussed, and the cases thereon collected, in the notes to *Manby v. Scott*, and other cases in 2 Smith's L. Cases.

Where husband and wife live together, and necessaries are delivered to the wife by her order, a jury may presume the husband's assent. *Bac. Abr. Baron and Feme (H.)*; *Freem. 2nd ed.*, 249, n. As, however, the liability of the husband turns on the question of the wife's power as his agent, the plaintiff, who relies on this presumption of agency, arising from cohabitation, must show that the goods he delivered to the wife were necessaries. *Phillipson v. Hayter*, L. R., 6 C. P. 38. The question is one of authority for the jury, and not simply whether the articles supplied were necessaries or not. *Atkins v. Curwood*, *ante*, p. 504; *Reid v. Teakle*, 13 C. B. 627; 22 L. J., C. P. 161; *Jolly v. Rees*, 15 C. B., N. S. 628; 33 L. J., C. P. 177; *Debenham v. Mellon*, 5 Q. B. D. 394, C. A.; 6 Ap. Ca. 24, D. P. And the husband may rebut the presumption of agency, by showing that he had forbidden his wife to pledge his credit, although the plaintiff had no notice of the prohibition. *Jolly v. Rees* and *Debenham v. Mellon*, *supra*. The presumption of agency may also be rebutted, by proof that the credit was given to the wife; *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22; or by proof of any other circumstances negating the husband's assent, as that the goods supplied are beyond the rank and station the husband maintains. *Montague v. Benedict*, 3 B. & C. 631. So in an action for the price of dresses delivered to his wife, the husband may show that his wife was already supplied with sufficient articles of dress, although the plaintiff did not know she was so supplied. *Renoux v. Teakle*, 8 Exch. 680; 22 L. J., Ex. 241. Where the order is plainly an extravagant one, that fact may be considered by the jury as tending to rebut the presumed agency. *Lane v. Ironmonger*, 13 M. & W. 368. Where a wife carried on business on her own account during the imprisonment of her husband, and, after his return, articles were furnished in the same business with his knowledge, he was held liable for these articles, though the invoices and receipts were made out in the wife's name. *Petty v. Anderson*, 3 Bing. 170.

As to the evidence necessary to connect the defendant with the woman to whom the goods were delivered, *vide post*, pp. 507, 508.

Where a wife is living separate it lies on the plaintiff to show that she does so under circumstances which imply an authority to pledge her husband's credit. *Johnston v. Sumner*, 3 H. & N. 261; 27 L. J., Ex. 341. If the wife leave her husband without his consent, there is no implied authority to bind him. If with his assent, there is no necessary implication of authority: but it may be implied, either by her destitution of adequate support *aliunde*, or inability to support herself. Thus, in the case of labouring people, both equally able to maintain themselves, an authority to bind the husband is not to be implied in the case of mere non-cohabitation. In those cases in which the husband would ordinarily support the wife, and she has no resources of her own, and he do not make her an adequate allowance, an authority to the wife to pledge her husband's credit for necessaries may be implied. S. C. *per cur.*, explaining *Hodgkinson v. Fletcher*, 4 Camp. 70. "And as in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiries as to the terms of the separation, for in such cases he must trust her at his peril." *Ozard v. Darnford*, 1 Selw. N. P., 13th ed. 229. Where the husband and wife had lived separate for many years, and the wife had adequate resources of her own, of which the plaintiff had notice, it was held that he could not sue the husband. *Liddlow v. Wilmot*, 2 Stark. 88; see *Thompson v. Hervey*, 4 Burr. 2177. So, even without a knowledge of her being provided for, the creditor, if he gives credit to her, and she is, in

fact, adequately provided for *aliunde*, cannot sue the husband. *Clifford v. Laton*, M. & M. 101. And, generally, it is now settled that if the wife is living apart from her husband, and he, in fact, allows her a sufficient maintenance, he is not bound by her contracts; and it is immaterial whether the tradespeople had notice of that allowance or not. *Mizen v. Pick*, 3 M. & W. 481; in which case, at p. 483, Alderson, B., says, "I do not see how notice to the tradesman can be material. The questions in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself, with everything proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable." This rule applies equally where the husband is insane, and he therefore lives apart from his wife in a lunatic asylum. *Richardson v. Du Bois*, L. R., 5 Q. B. 51. And a wife, living apart from her husband with his consent, on the terms that she shall accept a certain allowance, which is paid, has no authority to pledge his credit, though the allowance is inadequate. *Eastland v. Burchell*, 3 Q. B. D. 432. See also *Biffin v. Bignell*, 7 H. & N. 877; 31 L. J., Ex. 189.

Where the separation is compulsory, and is the act of her husband, he is liable, although an implied authority, in the strict sense of the word, can hardly be the ground of obligation. Thus where a wife leaves her husband under a reasonable apprehension of personal violence, he continues liable for necessities furnished to her; *Houlston v. Smyth*, 3 Bing. 127; and if living apart she obtain the custody of her infant child against her husband's will, by an order under 2 & 3 Vict. c. 54 (now replaced by 36 & 37 Vict. c. 12), the reasonable expenses of providing for it have been held to be part of the necessary expenses of the wife for which she has authority to pledge her husband's credit. *Bazeley v. Forder*, L. R., 3 Q. B. 559; *dis. Cockburn, C. J.* So, if he causelessly turns away his wife or shuts his door against her. *Lungworthy v. Hockmore*, cited 1 Ld. Raym. 444; see also *Rawlyn v. Vandyke*, 3 Esp. 251. In such cases, even a notice by him that he will not be answerable for her debts, will not relieve him from liability. *Boulton v. Prentice*, 1 Selw. N. P., 13th ed. 233; S. C., 2 Str. 1214; *Harris v. Morris*, 4 Esp. 42; *Harrison v. Grady*, 13 L. T., N. S. 369, M. T. 1865, C. P. A husband ill-treated his wife, and was indicted by her for the assault; a person who advanced money, for the purposes of the prosecution, to the attorney, without which he could not have gone on, could not recover it from the husband as money supplied to procure her necessities. *Grindell v. Godmond*, 5 Ad. & E. 755. But the husband is liable to the solicitor employed by the wife for the expenses of articles of the peace exhibited by the wife against him, although she may have a separate maintenance. *Turner v. Rooke*, 10 Ad. & E. 47. So for legal expenses incidental to a suit brought by her for restitution of conjugal rights, and for obtaining legal advice as to her position. *Wilson v. Ford*, L. R., 3 Ex. 63. So for the wife's extra costs of obtaining a divorce. *Ottaway v. Hamilton*, 3 C. P. D. 393, C. A. It lies upon the plaintiff to show, that under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him, and this even in an action for necessities. *Mainwaring v. Leslie*, M. & M. 18; 2 C. & P. 507; *Clifford v. Laton*, *supra*. And where the plaintiff caused a letter to be sent to the defendant, reminding him of his liability for necessities supplied to his wife, that she was getting into debt, and stating the wish of his wife to return to him, which the defendant received, but returned no answer, it was held some evidence, though slight, that the defendant had authorised his wife to pledge his credit for necessities. *Edwards v. Towels*, 5 M. & Gr. 624. If the husband is a lunatic, and incapable of making contracts, then he is bound by the orders for necessities given by his wife; for this is analogous to the case of an omission of

the husband to supply necessities, though the omission is involuntary. *Read v. Legard*, 6 Exch. 636; 20 L. J., Ex. 309.

A husband was liable for necessities provided for his wife, pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, directed the alimony to be paid from a date before the time when the necessities were provided. *Keegan v. Smith*, 5 B. & C. 375. A decree for alimony was, however, a bar to the husband's liability, if the alimony were duly paid, even though the decree had become inoperative through an appeal having been presented, it being shown that it might have been renewed on application to the court of appeal. *Willson v. Smyth*, 1 B. & Ad. 801. But after a divorce *à mens et thoro* for adultery in the husband, and a decree of alimony, the husband has been held liable for necessities supplied to the wife, if he omits to pay the alimony. *Hunt v. De Blaquiére*, 5 Bing. 550. After a decree of nullity, the liability of the husband for the debts of his pseudo-wife does not continue. *Anstey v. Mannors*, Gow, 10. And after sentence of judicial separation (20 & 21 Vict. c. 85, s. 26), the wife is, whilst so separated, to be considered a *feme sole*, for the purposes of contract and wrongs, and suits, and her husband is not liable in respect of her contracts or wrongs, or of the costs of proceedings by or against her in a civil suit but if he shall not have duly paid the alimony (if any) decreed, he shall be liable for necessities supplied for her use. And a wife, deserted by her husband, and obtaining protection under sect. 21, is, during the protection and desertion, deemed to be in like position, with regard to property and contracts and suits, as if she had obtained a decree of judicial separation. And see also 21 & 22 Vict. c. 108, s. 8. See on these sections, *Ewart v. Chubb*, L. R., 20 Eq. 454. So an order given to a wife under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, has the same effect as a judicial separation. Before these acts it had been considered that an express promise made by the husband to pay a debt contracted by the wife, after a separation and adequate allowance, was a ratification, and binding upon him. *Hornbuckle v. Hornbury*, 2 Stark, 177; accord. *Harrison v. Hall*, 1 M. & Rob. 185. But the principle of this ruling is open to question; see a note to the last-mentioned case.

Where the wife has separated from her husband, without cause and without his consent, the husband is not liable even for necessities supplied to her. *Child v. Hardyman*, 2 Stra. 875; *Hindley v. Westmeath*, *Ms. of*, 6 B. & C. 213, *per* Bayley, J. See also *Johnston v. Sumner*, 3 H. & N. 261; 27 L. J., Ex. 341, cited *ante*, p. 505. So *à fortiori*, where the wife elopes from her husband and lives in adultery. *Morris v. Martin*, 1 Stra. 647. And, in such case, the wife is a competent witness to prove the adultery; *Cooper v. Lloyd*, 6 C. B., N. S. 519; but the adultery cannot be proved by giving evidence of the proceedings for divorce, in which the jury found that the wife had been guilty of adultery, unless a decree has been pronounced altering the *status* of the parties. *Needham v. Bremner*, L. R., 1 C. P. 583. Where the husband turns the wife out of doors on account of her having committed adultery under his roof, he is not liable for necessities furnished to her afterwards. *Ham v. Toovey*, 1 Selw. N. P. 13th ed. 228. But if, after an adulterous elopement, the husband takes her back, he is liable for necessities subsequently supplied. *Harris v. Morris*, 4 Esp. 41.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, of which it is sufficient *prima facie* evidence that they are living together; *Car v. King*, 12 Mod. 372; or that she and the defendant cohabited, and that she passed as his wife with his assent, assumed his name, and lived in his house as part of his family; *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; for the presumed authority arising from cohabitation in the character and position

of a wife applies to such cases as well as to legal marriages, and is not rebutted by proving that the plaintiff knew the real position of the parties. *Watson v. Threlkeld*, ante, p. 507. But when the defendant has separated from a woman with whom he has lived, not being his wife, he is not liable for necessities supplied afterwards. *Monro v. De Chemant*, 4 Camp. 215. If, however, the separation be unknown to the plaintiff, and the goods have been supplied under circumstances which justify him in supposing that the authority of the defendant continued,—as where the defendant had authorised like orders before, and the woman continued to live in the same house where the former orders had been given,—it is a mere question of agency for the jury, and it is immaterial that the plaintiff knew that the parties were unmarried. *Ryan v. Sams*, 17 Q. B. 460.

Where the wife ordered goods to be delivered to her mother, saying her husband would pay for them, which he did; and she subsequently ordered other goods in like manner, it was held that there was evidence for the jury of the wife's authority to order the latter goods. *Filmer v. Lynn*, 4 Nev. & M. 569. The case is, in this respect, like that of a household servant. See ante, p. 496.

As to liability of wife for necessities supplied to her after her husband's death, see *Smout v. Ilbery*, 10 M. & W. 1, cited ante, p. 498.

Delivery to infant child.] The father of an infant to whom goods are supplied is only liable where an actual authority from him to his child is proved, or circumstances appear from which such an authority can be implied. *Baker v. Keen*, 2 Stark. 501; *Rolfe v. Abbott*, 6 C. & P. 286. *Quarr*, Whether a father, deserting his infant child of tender years, be liable to a person who supplies the child with necessities, no further proof of contract being given? Such action, at all events, cannot be maintained if the father had reasonable ground to suppose that the child was provided for. *Urmston v. Newcomen*, 4 Ad. & E. 899; see *Bazeley v. Forder*, L. R., 3 Q. B. 599, ante, p. 506. And the mere moral obligation arising from the relation of parent and child does not, *per se*, afford any legal inference of a promise on the part of a parent to pay a debt even for necessities supplied to the child; although he may, under certain circumstances, by proceedings under the 43 Eliz. c. 2, s. 7, be compelled to support his children according to his ability. *Mortimore v. Wright*, 6 M. & W. 482; *Shelton v. Springett*, 11 C. B. 452. The mother of a bastard child is bound by the 4 & 5 Will. 4, c. 76, s. 71, to maintain it till sixteen years old, but this is a mere personal liability; and on the death of the mother, leaving assets, the administrator cannot be sued for necessities supplied to the child after the death. *Ruttinger v. Temple*, 4 B. & S. 491; 33 L. J., Q. B. 1. It appeared that the plaintiff, a tailor, furnished clothes to the defendant's son, a boy at school; that the boy, when sent to the school, was in want of clothes; that when he went home for the holidays he took the clothes in question with him, but was not wearing them; and that he returned to school bringing them with him. Defendant lived near the place where the school was, but it did not appear that he had given any direction, or made any provision, for supplying his son with clothes. It was held that there was some evidence to go to a jury of an implied authority from the father. *Law v. Wilkin*, 6 Ad. & E. 718. This decision was contrary to the opinion of Parke, J., who had nonsuited at the trial, and it was dissented from in *Mortimore v. Wright*, *supra*.

By the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 37, "when any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of 14 years, whereby the health of such child shall have been or shall

be likely to be seriously injured, he shall be guilty of an offence punishable on summary conviction." This section makes the parent's moral duty of providing for his or her children an absolute one, in those cases falling within the enactment; *R. v. Downes*, 1 Q. B. D. 25; hence an express promise to pay for such necessities, already supplied is sufficient, and the prior request will be implied. See note to *Wennall v. Adney*, 3 B. & P. 249, n.; *Flight v. Reed*, 1 H. & C. 703, 716; 32 L. J., Ex. 265, 269; and 1 Smith's Lead. Cas., 8th ed. 158, 159.

Delivery to overseer.] Where goods were supplied for the use of the poor of the parish on orders signed by some of the overseers separately, all of whom had, on different occasions, promised to pay, this was held evidence of a joint contract, on which all the overseers were liable to be sued, including the assistant overseer who had signed. *Kirby v. Banister*, 5 B. & Ad. 1069; see *Eaden v. Titchmarsh*, 1 Ad. & E. 691. And an express promise will make them liable for medicines, &c., already supplied to a pauper on sudden illness without previous request. *Watson v. Turner*, B. N. P. 147; *Wing v. Mill*, 1 B. & A. 104. But, overseers are not, generally, legally bound by the contract of one or more of them; it is a question for the jury whether the parties sued did in fact join in it. *Marsh v. Davies*, 1 Exch. 668.

Value.] When the goods have been sold without any agreement as to the price, their value must be proved. If the vendor of goods is only able to prove the delivery of a package, without any evidence of the contents, it will be presumed against him that it was filled with the cheapest commodity in which he deals. *Clunnes v. Pezzey*, 1 Camp. 8. If a seller agrees to sell a machine at a certain price, and puts in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine. *Wilnot v. Smith*, 3 C. & P. 455. Where goods have been sold and delivered, to be paid for by bill at a certain date, if the bill be not given, the plaintiff may recover, as part of the stipulated price, interest from the time the bill would have become due; the special agreement should, however, be stated in the claim. *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 8 M. & W. 399.

Defence.

By Rules, 1883, O. xxi. r. 3, a defence in denial must deny the order or contract, the delivery, or the amount claimed. See also, O. xix. rr. 15, 17, 20, *ante*, pp. 283. Evidence of the various defences that may be set up to an action of this kind will be found under the general head of *Defences in actions on simple contract, post*.

Reduction of damages.] It was formerly a question in this action whether the defendant could give the bad quality of the article in evidence in reduction of the value claimed by the plaintiff, or whether it was only ground of cross action. Such evidence is admissible where the plaintiff claims only on a *quantum meruit*, and no price has been agreed upon. *Basten v. Butler*, 7 East, 479; *Farnsworth v. Garrard*, 1 Camp. 38. And, though a different practice formerly prevailed, it is now held that, in all cases of goods sold at a fixed price with a warranty, or agreed to be supplied according to a special contract, it is competent for the defendant in this form of action to show how much less the subject-matter of the action is worth by reason of the breach of warranty or contract; but any further damages sustained by the defendant beyond the difference of value must be recovered in a cross action; *Mondel v. Steel*, 8 M. & W. 858; *Parson v. Sexton*, 4 C. B. 899; or

now by way of counter-claim. And it seems that the acceptance and non-return of the goods by the defendant will not preclude this defence, though it may be evidence in favour of the plaintiff of a fresh contract to pay on the footing of a *quantum valebant*; *Mondel v. Steel*, ante, p. 509; *Grounsell v. Lamb*, 1 M. & W. 352. "The defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he may" . . . "claim no reduction at all, and afterwards sue for his entire cause of action." *Davis v. Hedges*, L. R., 6 Q. B. 687, 692. Where plaintiff sold to the defendant cyder, warranted good, which was bad and unsaleable, whereof defendant gave the plaintiff notice, and said he would continue to try it; to which plaintiff made no reply: Held, that the defendant was not liable, though he used more than was necessary to try it, and that there was evidence that the plaintiff acquiesced in the further trial, and that defendant was not bound to send back the cask with the remaining cyder. *Lucy v. Mouffet*, 5 H. & N. 229; 29 L. J., Ex. 110. A defence, relying upon a warranty of title, must be specially pleaded in cases where it is a defence at all, as to which, see ante, pp. 436, 437. Where a patented machine for printing in two colours was bought by the defendant after seeing it, and it turned out to be incapable of so printing, from a defect in the principle of it, it was held that he could not resist an action for the price; for the plaintiff complied with the order of the defendant, and sent him the very article which he bargained for, and (there being no fraud) the insufficiency of the alleged invention was no answer. *Ollivant v. Bayley*, 5 Q. B. 288. And in an action by the patentee of an alleged invention, against an assignee or vendee of the patent, the defendant cannot set up its invalidity for want of novelty, if there be no fraud or eviction; for there is no warranty on such sale. *Lawes v. Purser*, 6 E. & B. 930; 26 L. J., Q. B. 25; *Smith v. Neale* 2 C. B., N. S. 67; 26 L. J., C. P. 143. Where plaintiff sold to defendant by sample an article (*e.g.* alkali) not manufactured by himself, which proved unfit for defendant's use, this is no defence if the sample was fairly taken, though much of the article did not correspond with it. *Sayers v. L. & Birmingham Glass Co.*, 27 L. J., Ex. 294. Where the contract contains a clause, releasing the plaintiff from all responsibility in respect of the goods supplied by him after a certain time of trial, the purchaser cannot, after the time is passed, prove a latent defect in them in reduction of the price; there being no fraud alleged. *Sharp v. Gt. W. Ry. Co.*, 9 M. & W. 7.

As to the defence of fraud on sales, see ante, p. 297, *et seq.*, and *Defences to actions on simple contracts—Fraud*, post, p. 590.

Action brought before credit expired.] In calculating the time of the credit, the day of the sale must be excluded; and, therefore, where goods were sold on the 5th of October, to be paid for in two calendar months, an action could not be commenced till after the expiration of the 5th of December, and a writ issued on that day was premature. *Webb v. Fairmaner*, 3 M. & W. 473.

Where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he may maintain trover. *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 312. If by the contract it is agreed that a bill at a certain date shall be given, it operates as a giving of credit; and, although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered before the period when the bill, if given, would have become due. Therefore where a person purchased goods, and agreed to pay for them in three months by a bill at two months, which bill he afterwards refused to give, an action for goods sold was held not to lie before the expiration of five months.

Mussen v. Price, 4 East, 147; *Lee v. Riadon*, 2 Marsh, 495. So, when goods are sold at six months' credit, payment to be then made by a bill at two or three months at the purchaser's option, this is in effect a nine months' credit. *Helps v. Winterbottom*, 2 B. & Ad. 431; *Price v. Nixon*, 6 Taunt. 338. And where the goods are to be paid for partly in cash and partly by bills at three months, the payment of the money or delivery of bills does not constitute a condition to the credit, so as to enable the vendor to sue for goods sold before the expiration of the three months. *Paul v. Dod*, 2 C. B. 800. But where payment is to be "2½ per cent. or three months' bill," which is explained to mean cash, less discount, at the expiration of the month succeeding the current month, or at the buyer's option, a bill of three months from the same period, and the buyer refused to accept a bill at the end of the second month the seller may sue at once for the price. *Rugg v. Weir*, 16 C. B., N. S. 471. Where the purchaser has such option, by paying part in cash he waives his right to pay by bill. *Schneider v. Foster*, 2 H. & N. 4. And if part only of the goods are supplied, and the defendant then refuses to take more, the plaintiff may immediately sue for the goods delivered. *Bartholomew v. Markwick*, 15 C. B., N. S. 711; 33 L. J., C. P. 145. So, where goods were sold at three months' credit, the vendor agreeing to take the vendee's bill at three months' date, at the end of the first three months, if he wished for further time, and the vendee, at the end of the three months, did not give such bill, *Ld. Ellenborough* held that the giving the bill was a condition to the further credit, and that the vendor might bring an action for goods sold and delivered immediately. *Nickson v. Jepson*, 2 Stark. 227.

Where bills, given for goods, are dishonoured, the vendor may sue for the price immediately; *Hickling v. Hardey*, 7 Taunt. 312; *Mussen v. Price*, 4 East, 151; provided the bills are in the hands of the seller; but if they are in the hands of third persons, that is a defence to the action; for the defendant may be called upon by those persons to pay the bills. *Kearlake v. Morgan*, 5 T. R. 513; *Burden v. Halton*, 4 Bing. 455. But, if the bills were delivered at the plaintiff's request to C. as a trustee for the plaintiff, and they are still in the hands of C. as such trustee, and are dishonoured, there is no defence. *National Savings Bank Association v. Tranah*, L. R., 2 C. P. 556. When the buyer gives a promissory note of another person without indorsing it, the vendor may, on its dishonour, sue for the price of the goods without proving presentment to the maker, the note being produced by himself. *Goodwin v. Coates*, 1 M. & Rob. 221. So, where the vendor takes a bill, indorsed by the defendant, on a wrong stamp, in suing for the price of the goods he need not prove due notice of dishonour of the bill. *Cundy v. Marriott*, 1 B. & Ad. 696. But if he makes a bill his own by laches, it operates in satisfaction of the preceding debt; so if he makes it his own by altering it in a material part. *Alderson v. Langdale*, 3 B. & Ad. 660.

See further as to payment by bill or note, *post*, pp. 621, *et seq.*

ACTION ON SALES OF STOCK, SHARES, AND SECURITIES.

Shares in the public funds, in commercial partnerships and companies, and like interests, are choses in action, and were not assignable at common law, so as to pass a legal interest in them except by statute, as in the case of stock, railway shares, &c.; or by custom, as in the case of promissory notes

and bills of exchange. *Crouch v. Crédit Foncier of England*, L. R., 8 Q. B. 374. Such interests, however, are saleable, whether they be legal or equitable interests, and are the subject of contracts which the law will recognize and enforce. *Humble v. Mitchell*, 11 Ad. & E. 205; *Tempest v. Kilner*, 2 C. B. 300. And the legal right therein is now assignable under J. Act, 1873, s. 25, (6), *ante*, p. 282. Such shares are not "goods, wares, or merchandise" within the Stat. of Frauds, s. 17, *ante*, p. 469, though they are "goods and chattels" within the meaning of a claim by the seller for the price of them, *ante*, p. 493.

A sale of such securities, which pass by delivery only, is not like a sale of specific goods; it passes no property till delivery, and, in effect, it means only a contract to deliver some stock. *Heseltine v. Siggers*, 1 Exch. 856, *per cur.* The same held good in the case of all contracts for the sale and purchase of shares; for the sellers' contract was only to procure a transfer of some shares to the buyer; *Rudge v. Bowman*, L. R., 3 Q. B. 689; but contracts for the sale of shares in joint-stock banking companies in the United Kingdom are now for the sale of specific shares, as such contracts are regulated by 30 & 31 Vict. c. 29, s. 1, which provides that all contracts of sale and purchase, made for the sale or transfer, or purporting to be for the sale or transfer, of any shares, stock or other interest in any joint-stock banking company in the United Kingdom (except the Bank of England or of Ireland, sect. 3), issuing shares or stock, transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract shall set forth and designate in writing such shares, &c., by the respective numbers by which the same are distinguished at the making of such contract, on the register or books of such banking company, or where there is no such register of shares or stock by distinguishing numbers, then, unless such contract, shall set forth the person in whose name such shares shall, at the time of making such contract, stand as the registered proprietor thereof in the books of such banking company.

See on this section *N. Mitchell's Case*, Ct. Sess. Cas. 4th ser. vi. 420; affirm. on another ground, 4 Ap. Ca. 624, D. P.

Where a broker on behalf of A. entered into a contract for the sale of bank shares to B. without specifying therein the particulars required by this section, and the bank having stopped payment, and the shares became worthless, B. refused to accept them, the broker was held to be liable to A. in damages, at any rate equal to the contract price of the shares. *Neilson v. James*, 9 Q. B. D. 546, C. A. A custom of the Stock Exchange to disregard the statute is unreasonable and illegal. S. C.

A contract for the sale of shares in a company is not rescinded by the Companies Act, 1862, s. 153, if the company has commenced to be wound up under that act, after the contract was made and before the transfer was executed. *Chapman v. Shepherd*, and *Whitehead v. Izod*, L. R., 2 C. P. 228. Nor is a contract for the sale of shares, entered into after the commencement of the winding-up, made illegal by that section; *Rudge v. Bowman*, *supra*; nor where the winding-up is voluntary, by sect. 131. *Biederman v. Stone*, L. R., 2 C. P. 504.

As to time bargains and wagering contracts for sale and purchase of stock and shares, *post*, p. 529.

A dividend declared after the contract of sale of shares and before completion belongs to the purchaser. *Black v. Homersham*, 4 Ex. D. 24.

[*Sales on the Stock Exchange.*] Shares, stock, and other securities are usually bought and sold on the London or some local Stock Exchange, and the transactions are consequently regulated by the usage of the Exchange. *Grissell v. Bristowe*, L. R., 4 C. P. 49, Ex. Ch.; *Maxted v. Paine*, L. B., 6

Ex. 132, Ex. Ch.; *Merry v. Nickalls*, L. R., 7 H. L. 530; *vide ante*, p. 25. The usage of the London Stock Exchange is to be found fully set out in those cases, and the rules then in force will be found at L. R., 4 C. P. 53, n. As, however, these rules have undergone some modifications, and are very frequently referred to, it will be useful here briefly to describe how the transactions are carried out, and to state the most important of the printed "Rules and Regulations" as adopted in the year 1883, and which are still in force. See also the evidence in *Ex pte. Grant*, 13 Ch. D. 667, C. A.

It must first be observed that the Stock Exchange only recognizes dealings with its own members, and consequently all members, whether dealers on their own account, called "jobbers," or brokers acting for a principal, contract with each other as principals (r. 52). Hence the term member, hereafter employed, will include both jobbers and brokers. Every calendar month is divided into two nearly equal periods, each called "the account," and it is with reference to one or other of these accounts, that all contracts for sale or purchase of stocks and shares (rr. 85, 107), other than English and India stocks, or the scrip of a new loan, or shares in a new company, are made. The three last days of each account are called the settling-days, and are known respectively as—1st. The making-up day; 2nd. The ticket or name day; 3rd. The settling or pay-day. The pay-days are fixed by the Committee of the Stock Exchange (r. 134), at about the middle and end of each month.

Taking first the case of shares transferable by deed of transfer. The buying member, to whom the shares have been sold, is at liberty by the name-day to substitute, if he is able to do so, another person as buyer, and so relieve himself from further liability on the contract, provided that to such person the seller cannot reasonably except, and that such person accept the transfer of the shares, and pay the price agreed on between the seller and the buyer; in other words, become the buyer of the shares at the price originally agreed on. *Grissell v. Bristowe*, L. R., 4 C. P. 36, 45. Ex. Ch.; overruling *S. C.*, L. R., 3 C. P. 112; and *Coles v. Bristowe*, L. R., 4 Ch. 3; overruling *S. C.*, L. R., 6 Eq. 149; *Torrington, Vt.*, v. *Lowe*, L. R., 4 C. P. 26; *Masted v. Paine*, L. R., 4 Ex. 203; Ex. Ch., L. R., 6 Ex. 132; and *Masted v. Morris*, 21 L. T., N. S. 535; M. T. 1869, Ex. When the seller has accepted the nominee of the original buyer, the contract with the latter, and his liability is at an end; the seller, by transferring the shares to the nominee, and so putting it out of his power to transfer the shares to the original buyer, irrevocably declares his acceptance of the nominee. S. CC. This, of course, assumes that the nominee is a person legally capable of entering into the contract with the seller; where this is not so, as where he is an infant, the original buyer remains liable. *Merry v. Nickalls*, L. R., 7 H. L. 530, *post*, p. 515.

This process of substituting another name, for that of the original buyer, is carried on by means of tickets, in the following manner: the buyer, B., who takes up securities deliverable by deed of transfer, on the day before the ticket-day, or before 1.30 p.m. on the ticket-day,* issues a ticket with his own name, as payer of the purchase money, which ticket contains—the amount and denomination of the stock or security to be transferred, the name, address, and description of the ultimate transferee, A., in full, the price, the date, and the name of the member to whom the ticket is issued. This ticket is passed through the hands of all the intermediate sellers, C., D., E., W., in succession, each of them indorsing thereon the name of his immediate seller, D., E., F., X., (r. 90),* till it ultimately

* R. 90 contains also these further directions, viz.—

On ticket-days the passing of tickets commences at 10 a.m., and they may be left

reaches the member Y., who is actually to procure the transfer of the shares; the result is that Y. is brought into contact with B. Y. is then bound within ten days to deliver to B. an instrument of transfer of the shares to A. executed by Z., the ultimate seller, the person in whose name they are registered, together with the coupons or certificates showing Z.'s title to the shares, or a certificate on the transfer deed, that they have been deposited with the Secretary of the Stock Exchange, or with the Company whose shares are being transferred. B., on receiving the transfers and certificates from Y., pays him the price named on the ticket and the stamp duty on the transfer (rr. 94-98). Where B. and Y. are acting as brokers for A. and Z. respectively, the delivery of the ticket to Y., which was issued by B., establishes privity of contract between A. and Z. See judgment of Blackburn, J., in *Masted v. Paine*, L. R., 6 Ex. 162; also *Merry v. Nickolls*, L. R., 7 H. L. 530.

"A seller may require payment of the difference between the price marked on the ticket, and the making-up price of the day on which the ticket is tendered; but if such making-up price be above the price of sale, he shall only be entitled to claim the difference up to the price of sale" (r. 68). Members set off their transactions as much as possible between each other, and deliver tickets for the balance of the shares, and of these only they require to take delivery at the account. When the number of shares on the ticket delivered to a member is greater than he wishes to pass on to one single member, he may "split" the ticket or divide the shares between other similar tickets, which he passes on, retaining the original ticket (see r. 90). In this event the buyer shall pay for any portion of shares or stock that may be presented, provided the number be not less than ten shares, or the value less than 200l. (r. 97).

It is the duty of the seller to deliver genuine transfers and certificates (r. 88), and it is the duty of the purchaser thereupon to execute those transfers, and to procure their registration at the office of the company; the seller does not contract to obtain the consent of the directors to the transfer, at any rate until the purchaser has done all that is usual to obtain that consent. *Wynne v. Price*, 3 De G. & Sm. 310; *Sayles v. Blane*, 14 Q. B. 205, 206; *Stray v. Russell*, 1 E. & E. 888; 28 L. J., Q. B. 279; 1 E. & E. 916; 29 L. J., Q. B. 115, Ex. Ch.; *Biederman v. Stone*, L. R., 2 C. P. 504. A special action lies at the suit of the seller against the buyer on an implied indemnity, if by reason of the buyer allowing the seller's name to remain on the register of shareholders, the latter is obliged to pay subsequent calls; *Walker v. Bartlett*, 18 C. B. 845; 25 L. J., C. P. 263, Ex. Ch.; and in such case the transferor may also sue the transferee for not registering the transfer of the shares to him. See judgment in *Grissell v. Bristowe*, L. R., 3 C. P. 112; not affected on this point by judgment of Ex. Ch. So, when the seller has adopted the nominee as the buyer, and the price has been paid by the one, and the property transferred by the other, a contract, and the relation of vendor and vendee, immediately arises between them (see judgment of Ex. Ch., in *Grissell v. Bristowe*, L. R., 4 C. P. 36, 51), and this brings the case within the principle of *Walker v. Bartlett*, *supra*, so that the nominee is liable to indemnify the seller for loss if the nominee do not

at the office of the seller up to 1.30 p.m. They may also be passed on the day before the ticket-day.

A member receiving a ticket from the issuer after noon on the ticket-day, notes the same on the back of the ticket; the member who first receives a ticket after 1, 1.30, 2, or 2.30 p.m., shall draw a line noting such times; and each member receiving a ticket after 3 p.m., or at any time on any subsequent day, marks thereon the exact time at which he received it.

register the shares in his name ; this is so both at common law ; *Davis v. Haycock*, L. R., 4 Ex. 373 (where, however, the court was equally divided) ; *Bowring v. Shepherd*, L. R., 6 Q. B. 309, Ex. Ch. ; and in equity ; *Evans v. Wood*, L. R., 5 Eq. 9 ; *Shepherd v. Gillespie, Id.*, 293 ; L. R., 3 Ch. 764 ; *Hawkins v. Maltby*, L. R., 3 Ch. 188 ; L. R., 6 Eq. 505 ; L. R., 4 Ch. 200 ; *Hodgkinson v. Kelly*, L. R., 6 Eq. 496 ; *Sheppard v. Murphy*, I. R. 2 Eq. 544, fully cited L. R., 4 C. P. 33.

Until the delivery by the member X., who entered into the contract with the broker Y. of the seller Z. of the shares, of the name of a proper nominee, X. remains liable to carry out his contract. *Maxted v. Paine* (1st action) ; *Merry v. Nickalls, infra*. And where the contract is made "with registration guaranteed," X. is liable to indemnify Z. if the nominee do not register the transfer executed to him by Z. *Cruse v. Paine*, L. R., 6 Eq. 641 ; L. R., 4 Ch. 441.

The nominee must have agreed to buy the shares, and where he agreed to buy for one settling-day, and his broker, without his consent, carried over the sale to the next settling-day (as to which *vide infra*), the original buyer was held to remain liable to carry out his contract, and to indemnify the seller ; *Maxted v. Paine* (1st action), L. R., 4 Ex. 81 ; *Maxted v. Morris*, 21 L. T., N. S., 535 ; M. T. 1869, Ex. ; so, the buyer was held liable to indemnify the seller, where the former passed the name of an infant, L., as the transferee ; L. being incapable of entering into a valid contract. *Merry v. Nickalls*, L. R., 7 Ch. 733 ; L. R., 7 H. L. 530. In this case a transfer had been executed by the seller to L., and objection was not taken to L. within ten days under the rule below mentioned, as neither the seller nor buyer knew of L.'s infancy. Where, however, the infant transferee sued the vendor to set aside the contract on the ground of fraud, and the vendor compromised the action by repaying the purchase-money, it was held that he was bound by this compromise, and could not afterwards sue the real purchaser. *Maynard v. Eaton*, L. R., 9 Ch. 414.

The nominee must, in any case, at least, in which there is any existing liability on the shares to be transferred, be a person open to no reasonable objection, and, by the usage of the Stock Exchange, the seller has ten days from the account day during which he may object to him. If an objection be made, it is referred to the Committee of the Stock Exchange, and admitted or overruled by them, according to the merits of the case, and, if admitted, the member P., who entered into the contract, is bound to find another nominee free from objection, or to perform the contract himself. *Maxted v. Paine*, L. R., 4 Ex. 203, 220, *per Kelly*, C.B. ; *Merry v. Nickalls*, L. R., 7 H. L. 539, 540. This usage does not appear in the printed Stock Exchange rules, but there seems no ground for the doubt expressed by Blackburn, J., (see L. R., 6 Ex. 179), as to its existence. The seller is not bound to accept the name of a foreigner resident abroad. *Goldschmidt v. Jones*, 22 L. T., N. S. 220, M. R. ; *Allen v. Graves*, L. R., 5 Q. B. 478. Nor that of an infant, *vide supra*.

Where a member who has agreed to buy or sell shares, does not desire to take up or deliver them at the account for which they were bought, the contract is frequently "carried over" or "continued" to the next account ; this is arranged on the making-up day, and on the morning of the settling-day all unsettled bargains are brought down, and temporarily adjusted at the making-up price of the ticket-day, except bargains in stocks and shares, subject to arrangement by the settlement department of the Stock Exchange, which are adjusted at the making-up price of the making-up day (*vide infra*, r. 105). The "difference" payable on such adjustment is paid on that, and each subsequent settling-day, until the closing of the transaction. On the making-up day and on the ticket-day, the Clerk of the Stock Exchange, at noon, fixes the making-up prices, by taking the then actual prices (r. 104).

which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the Official Assignees" (r. 171); but the assignees shall not claim differences on a defaulter's estate until they become due (r. 172). See hereon *Ex pte. Grant*, 13 Ch. D. 667, C. A.; *Ex pte. Ward*, 22 Ch. D. 132, C. A.

Time bargains for the sale of stock, or shares of which the seller is not possessed at the time but which are to be transferred at a future time, may be void under Stat. 8 & 9 Vict. c. 109, s. 18, *post*, p. 550, as a wager, *e.g.*, where the real bargain is that differences only shall be paid at the time of completion. *Gricevood v. Blaine*, 11 C. B. 538; 21 L. J., C. P. 46; *Cooper v. Neil*, W. N. 1878, p. 128, T. S. C. A. A contract of this nature is however unusual on the Stock Exchange, and the general course of speculation is as follows: see *Ex pte. Grant*, 13 Ch. D. 667, 670, *et seq.* A employs B, a broker to speculate for him; B, to carry out the speculation, enters into contracts to buy or sell stock or shares for A., and in order to protect himself, B. enters into contract to sell or buy respectively (*vide ante*, p. 515, 516), as A. knows that B. must. A. never intends to take delivery of, or deliver the stock bought for or sold to him, as B. knows, but is content to run the risk of having to accept or deliver, in the hope B. will be able to arrange matters, so that differences only shall be payable, and B. knows A. could not pay for stock bought, or deliver that sold for him. In such a case B. having entered into real contracts on behalf of A., the transactions between them is not of a wagering nature, and B. is entitled to be indemnified by A. and to recover commission on the sales or purchases. *Thacker v. Hardy*, 4 Q. B. D. 685, C. A.; *Knight v. Fitch*, 15 C. B. 566; 24 L. J., C. P. 122. It is not material that B. has not entered into separate contracts on A.'s behalf, but has appropriated to him parts of larger amounts of stocks, which he has bought, as principal, in view of dividing them among A. and other clients. *Ex pte. Rogers*, 15 Ch. D. 207. See further as to B.'s rights against A. *post*, p. 530.

The actions of ordinary occurrence are,—for not accepting stock or shares; for not delivering or replacing them; and for not paying for them when transferred.

Action for not accepting.] The plaintiff, in order to prove his alleged tender of or readiness to transfer stock, if denied, must show his attendance at the time or latest office hour of the day fixed for transfer, and the non-attendance of the defendant; or an actual tender and refusal to accept by the defendant; or that defendant in some way dispensed with such tender or attendance of the plaintiff; *Bordenave v. Gregory*, 5 East, 107; and on such sales the facts proved may warrant a finding of readiness to transfer, though no transfer be actually tendered. *Humble v. Langston*, 7 M. & W. 517; see *ante*, pp. 481, 489, and *Shaw v. Rowley*, 16 M. & W. 810. Although the court gave no decision on the point, it was intimated in *Hibblewhite v. M'Morine*, 6 M. & W. 200, that such readiness was disproved, by showing that the plaintiff had no stock or shares to transfer at the time for completion. As, however, it was decided in *Rudge v. Bowman*, L. R., 3 Q. B. 689, that the seller does not contract that he will himself transfer the shares, for the contract is merely to procure a transfer of shares, into the defendant's name, it seems immaterial whether the plaintiff have the stock standing in his own name or not, provided he has the requisite amount of shares under his control. In a contract to deliver shares on a certain day, time is of the essence of the contract, both at law; *Fletcher v. Marshall*, 15 M. & W. 755, 763; see also *Maxted v. Paine*, and *Maxted v. Morris*, *ante*, p. 515; and in equity; *Doloret v. Rothschild*, 1 Sim. & St. 590.

The plaintiff must of course be prepared to prove the title, if in issue, but

the title to shares in commercial companies, in which no documentary evidence of title is provided, does not stand on the same footing as the title to land, and requires no such strict proof. On the sale of a share in a cost-book mine, proof of the existence of the mine and of the authorized entry of the plaintiff's name in the cost-book of the mine as an adventurer, will be evidence of title. The contract of sale in such adventures seems indeed to amount to nothing more than an agreement to substitute the defendant for the plaintiff in the possession of such interest as the plaintiff, in common with the other shareholders, can lawfully claim in the subject of the adventure. See *Curling v. Flight*, 6 Hare, 41; S. C., *cor. Ld. Cottenham, C.*, 2 Phill. 613. Where the question was whether there was a proper conveyance by deed, a written transfer by a foreigner of a foreign mine is evidence of it, though not under seal; it not appearing by any evidence that a seal was necessary abroad. *Steigenberger v. Carr*, 3 M. & Gr. 191. See further as to the proof of the title to shares, *post*, Part III., *Actions by and against companies*.

It was held that, in the absence of usage to the contrary, where the assent of directors was necessary for a transfer, the vendor must procure and show such assent; *Wilkinson v. Lloyd*, 7 Q. B. 27; and that it was the business of the purchaser to prepare and tender the written transfer to the seller for his execution. *Stephens v. De Medina*, 4 Q. B. 422. But where, as is commonly the case, the sale takes place on the Stock Exchange, the contract is regulated by the usage of that market; by that usage, it is the duty of the vendee to pass a name of a person to whom the vendor is to transfer the shares, and the latter is to tender certificates and transfers of them, duly executed, to the vendee, and it is thereupon the duty of the vendee to execute those transfers, and to register them at the offices of the company (*ante*, pp. 513, 514). By the Companies Clauses Consolidation Act, 1845, s. 12, the want of the certificate of shares in a company constituted under that act shall not prevent the holder from disposing of the shares.

Where the company is not completely constituted, a contract for the sale of shares will be satisfied by the tender of the letter of allotment made out to the seller; for that is all which could have been contemplated by the parties. *Tempest v. Kilner*, 3 C. B. 249. As to contracts on the Stock Exchange for shares of a new company, *vide ante*, p. 517.

Where bought and sold notes for the sale of mining shares named the time for payment, but were silent as to the time of delivery, oral evidence was held admissible to show that, by custom, the shares were not deliverable till the time named for payment. *Field v. Lelean*, 6 H. & N. 617; 30 L. J., Ex. 168.

Damages.] The measure of damages for not accepting stock sold, is the difference between the contract price and the market price on the day of the breach of contract. *Boorman v. Nash*, 9 B. & C. 145. The measure of damage in the case of railway or other shares in companies is the difference between the contract price, and the market value on the day of breach, or earliest day afterwards on which they could be sold. *Pott v. Flather*, 16 L. J., Q. B. 366.

Action for not delivering, or replacing.] The vendee, in the absence of usage or express agreement on the point, must show a tender to the defendant of a written transfer for execution by him, in cases where such formal instrument is necessary, as in railway shares; *Stephens v. De Medina*, *supra*; unless the defendant has, by his conduct, dispensed with such tender. See cases, *supra*. In a sale on the Stock Exchange the tender is unnecessary, as it is there the duty of the transferor to deliver a transfer to the

transferee, together with certificates of the shares, but he must show that the name of the transferee was duly passed. *Vide ante*, pp. 513, 514. A tender of payment by the plaintiff is not necessary. *Stephens v. De Medina, ante*, p. 519. It is only necessary that he should be ready and willing and able to pay. A contract to deliver shares in a company does not require the actual delivery of the scrip certificates, but it is sufficiently performed when the vendor has put the vendee in the position of legal owner of the shares. *Hunt v. Gunn*, 13 C. B., N. S. 226. Where, after the contract for the sale of shares, and before transfer, new shares are allotted to the vendor in right of the shares he has sold, the purchaser is entitled to these shares. *Stewart v. Lupton*, 9 W. N. 1874, p. 171, V.-C. M., *Id.*, p. 178, L. J. See Rules of the Stock Exchange, 1883, r. 103. In a contract to deliver shares on a certain day, time is of the essence of the contract. *Vide ante*, p. 518.

Damages.] When the action is for non-delivery, and the plaintiff had not paid the price, the measure of damage is the difference between the contract price and the market value on or about the day of breach; for the plaintiff might have bought other stock immediately; and the same rule applies to shares in a company. *Shaw v. Holland*, 15 M. & W. 136; *Tempest v. Kilner*, 3 C. B. 253.

In an action for not replacing stock or shares, lent by the plaintiff to the defendant, a different measure is adopted. There the plaintiff may have been prevented from replacing them himself, for he may not have had, and is not bound to have, funds in his hands to do so. He is therefore entitled to damages sufficient to enable him to buy other stock or shares, at the current price at the time of the trial, if that be larger than the price at the time fixed for replacing. *Shepherd v. Johnson*, 2 East, 211; *McArthur v. Seaforth, Ltd.*, 2 Taunt. 257; *Owen v. Routh*, 14 C. B. 327; 23 L. J., C. P. 105. Any other special damage arising from the breach of contract, such as the loss of dividends, &c., must be alleged in the claim if sought to be recovered.

Action for shares, &c., sold.] In a sale on the Stock Exchange the transferor must prove a tender of the transfer and of the certificates of the shares to the buyer, or his broker, unless such tender has been waived. *Vide ante*, p. 519. Where shares in a company are not legally saleable for want of registration of the company under an act of parliament, this may be pleaded as a defence. *Semb.*, *Lawton v. Hickman*, 9 Q. B. 563.

In the sale of shares or securities there is generally no implied warranty; but it is implied that they are really what they purport to be, and what the buyer means to purchase. Where, for instance, scrip is known in the market as "Kentish Railway scrip," though informally issued by a railway company, the buyer cannot treat the sale as a nullity on that ground, if the jury find that it was what he contracted to buy. *Lambert v. Heath*, 15 M. & W. 486.

ACTION FOR WORK AND MATERIALS.

In an action for work done, the plaintiff's proofs are, 1. The contract, express or implied; 2. The performance of the work and supply of materials, if any; and 3. The value, if the remuneration is not ascertained by the contract.

The contract.] Where there was a special agreement, the terms of which had been performed, it raised a duty for which an *indebitatus assumpsit* or the common counts lay. B. N. P. 139; cited by Holroyd, J., in *Studdy v. Sanders*, 5 B. & C. 638; *Robson v. Godfrey*, Holt, N. P. 236. And this principle still holds good although the Rules, 1883, O. xix., rr. 4, 5, 6, 15, *vide ante*, pp. 282, 283, require a more specific statement of the plaintiff's claim.

If the contract has not been executed, but the plaintiff has been prevented from executing it by the absolute refusal of the defendant to perform his part of it, or by an act done by the defendant which has incapacitated the plaintiff from performing it, the plaintiff may rescind the contract, and sue on a *quantum meruit* for past services. *Planché v. Colburn*, 8 Bing. 14; 2 Smith's Lead. Cas., notes to *Cutler v. Powell*. So, where the plaintiff was to have certain goods for his services, and the defendant sold them, or caused them to be sold, by his own default, this action lies for the money value. *Keys v. Harwood*, 2 C. B. 905. Where the plaintiff agreed to print a work, but refused to print a libellous dedication to it, and the author thereupon refused to accept or pay for the rest, he was held liable to pay for printing the body of the work. *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237.

If there is a special agreement, and work has been done and been adopted by the defendant, though not strictly pursuant to such agreement, the plaintiff may recover upon a *quantum meruit*; for otherwise he would not be able to recover at all. B. N. P. 139; *Burn v. Miller*, 4 Taunt. 745. But the defendant may refuse to pay for the subject-matter of the plaintiff's work and labour, where it deviates from the special contract; and in such cases the plaintiff cannot recover even on a *quantum meruit*. *Ellis v. Hamlen*, 3 Taunt. 52. Where, indeed, the plaintiff contracted to build cottages by the 10th of October, and they were not finished until the 15th, the defendant, having accepted the cottages, was held liable on a general declaration for work, labour, and materials. *Lucas v. Godwin*, 3 N. C. 737. See *Gray v. Hill*, Ry. & M. 420; and *Savage v. Canning*, 1 R., 1 C. L. 434, C. P., cited *ante*, p. 469, and *infra*.

An implied promise to pay for work done *extra*, and not under the contract, can only arise in cases where the defendant is competent to contract by parol, *Lamprell v. Billericay Union*, 3 Exch. 283. As to the liability of a corporation for work done, see *post*, Part III., *Actions by Companies*.—*Contracts by Corporations*.

To fix a defendant with extras, the acceptance and adoption ought to be under circumstances which imply approval and waiver of the deviation, and make it practicable to repudiate; for a defendant cannot be expected to refuse a house built on his own land, or to repudiate materials and labour worked into the *corpus* of his own property. In such cases the decisions in *Sinclair v. Bowles*, 8 B. & C. 92, *post*, p. 528; and *Ellis v. Hamlen*, *supra*, seem to apply. In *Lucas v. Godwin*, *supra*, the stipulation as to time was held not to be a condition precedent; and there was also extra work done. The rule with regard to additions or alterations, in the case of a special contract, must be taken with this limitation, that the workman cannot charge for them unless his employer is expressly informed, or must necessarily from the nature of the work be aware, that they will increase the expense. *Lovelock v. King*, 1 M. & Rob. 60. Where the special contract is so entirely abandoned by consent that it is impossible to trace it, the workman will be permitted to charge by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract will operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging. *Pepper v. Burland*, Peake, 103. Where there is a written contract it must be produced, although the plaintiff seeks only to recover

for extras not included in it; *Vincent v. Cole*, M. & M. 257; for the contract is the proper evidence to show what are extras; *Jones v. Howell*, 4 Dowl. 176; *Buxton v. Cornish*, 12 M. & W. 426; and if, unstamped, the judge cannot look at it to see whether it extends to the work claimed as extras. S. CC.; and see *Edie v. Kingsford*, 14 C. B. 759; 23 L. J., C. P. 123. In *Vincent v. Cole*, *supra*, it was held that even a distinct promise by the defendant to pay for the work would not supersede the production of the contract; but it was not held (though so stated in the marginal note) that an admission by the defendant that it was extra the contract, was insufficient to fix him without producing it. Yet, *semble*, as a building contract usually contains general provisions as to extra works, even this admission may not dispense with the production, unless the defendant has also admitted that it contains no such provisions. Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given orally during the continuance of the first employment, the written contract need not be produced in an action for the second work. *Reid v. Batts*, M. & M. 413.

Where A. contracts with B. to do work for A. which involves B.'s individual skill, personal performance by B. is of the essence of the contract. *Robson v. Drummond*, 2 B. & Ad. 303. Where, however, B.'s individual skill is not involved, B. may assign his interest in the contract to C., and performance by C. is sufficient. *British Waggon Co. v. Lea*, 5 Q. B. D. 149.

An action will lie against the employer for preventing work being done under a contract, *e.g.* by not supplying plans, and setting out the work. *Roberts v. Bury Commissioners*, L. R., 5 C. P. 310, Ex. Ch.; or not giving the contractor possession of the site for the work. *Lawson v. Wallasey Local Board*, 11 Q. B. D. 229; 48 L. T. 507, E. S. 1883, C. A.

As to warranty with respect to plans, specifications, and quantities, *vide ante*, p. 436.

Conditions precedent—Architect's certificate.] In *Morgan v. Birnie*, 9 Bing. 672, the surveyor's certificate, required by the contract, was held a condition precedent to the plaintiff's right to sue in respect of work done under it; and a letter inclosing the bills, with an approval of the charges, is not equivalent to a certificate of approval of the work done. S. C. And it is no dispensation of the condition that it is withheld by fraud or collusion with the defendant; *Milner v. Field*, 5 Exch. 829; but an action is maintainable, alleging that the architect withholds the certificate in collusion with, and by the procurement of the defendant; for such an action is based on fraud. *Batterbury v. Vyse*, 2 H. & C. 42; 32 L. J., Ex. 177. But apart from fraud, the wrongful withholding by the surveyor of the certificate affords no ground of action. *Clarke v. Watson*, 18 C. B., N. S. 278; 34 L. J., C. P. 148. The principle of *Morgan v. Birnie*, and *Milner v. Field*, *supra*, is supported by *Grafton v. E. Counties Ry. Co.*, 8 Exch. 699; *Pashley v. Birmingham*, 18 C. B. 2; *Ranger v. Gt. W. Ry. Co.*, 5 H. L. C. 72; *Goodyear v. Weymouth, Mayor, &c. of*, H. & R. 67; 35 L. J., C. P. 12; and see *Scott v. Liverpool Corporation*, 3 De G. & J. 334; 28 L. J., Ch. 230; *Russell v. Sa Da Bandeira, Vt.*, 13 C. B., N. S. 149; 32 L. J., C. P. 68; *Roberts v. Bury Commissioners*, L. R., *supra*; and *Jones v. S. John's College*, L. R., 6 Q. B. 115. Where the surveyor is to give certificates and fix the price of extras and additions, his certificate conclusively determines what are extras and additions. *Richards v. May*, 10 Q. B. D. 400. The surveyor or architect need not certify in writing, unless expressly required by the contract. *Roberts v. Watkins*, 14 C. B., N. S. 592; 32 L. J., C. P. 291. Where the contract required the work to be done to the satisfaction of the other party, his approval was held not to be a condition precedent. *Dallman v. King*, 4

N. C. 106. But if the parties have clearly left it to the employer to decide as to the sufficiency of the compliance with the contract, his decision is conclusive as long as he acts *bonâ fide*; *Stadhard v. Lee*, 3 B. & S. 364; 32 L. J., Q. B. 75. In building contracts, payments on architect's certificates during the work, are considered as payments on account of the sum eventually found due; and the time of completion is not generally of the essence of the contract. *Lamprell v. Billericay Union*, 3 Exch. 283. An alteration made by the defendant in the written conditions will not enable the plaintiff to dispense with them, and sue on a *quantum meruit*. *Pattinson v. Luckley*, L. R., 10 Ex. 330.

An architect's certificate for work done does not dispense with the necessity for a previous written order where required by the contract. *Tharsis Sulphur & Copper Co. v. M'Elroy*, 3 Ap. Ca. 1040, D. P.

It may be here noticed that, in the absence of fraud, no action will lie against an architect for improperly certifying or refusing to certify. *Stevenson v. Watson*, 4 C. P. D. 148.

Liability of defendant.] Where the defendant had contributed to the funds of a building society, and had been party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses, without proof of his interest in them, or in the land. *Braithwaite v. Skofield*, 9 B. & C. 401. So a subscriber, who is one of a committee for managing the affairs of a hospital, is personally liable to the creditors of the hospital, for goods supplied with the sanction of the committee. *Burls v. Smith*, 7 Bing. 705. For cases on the personal liability of partners, members of clubs, shareholders, &c., see *ante*, p. 498, *et seq.*

As to the liability of a company after its incorporation for preliminary expenses incurred by the promoters in its establishment, see *Melhado v. Porto Alegre Ry. Co.*, L. R., 9 C. P. 505; *In re Hereford, &c., Engineering Co.*, 2 Ch. D. 621, C. A.; and other cases cited *post*, Part III., *Actions by and against Companies*.

Where orders are given by a public officer, acting on behalf of a public body, or of a known department of the State, and in discharge of his duty as such, it is to be presumed that personal credit is not given to him, and he is not liable. *Macbeath v. Haldimand*, 1 T. R. 172; *Goodwin v. Roberts*, L. R., 10 Ex. 344, 345, *per* Cockburn, C. J. This rule applies to such officers as a colonial governor; commissary; commanding officer of a regiment, or of a king's ship; justices contracting to build a county bridge, &c. *Allen v. Waldegrave*, 2 B. Moore, 621; *Myrtle v. Beaver*, 1 East, 135; *Unwin v. Wolseley*, 1 T. R. 674; *Palmer v. Hutchinson*, 6 Ap. Ca. 619, P. C. But, where navigation commissioners employed the plaintiff to do certain of the works, all the acting commissioners were held personally liable. *Horsley v. Bell*, Ambler, 770. So where the defendant, the clerk of a county court, ordered the plaintiff to fit up the court, and the bill was allowed by the county court judge, it is for the jury to say whether the work was not done on the clerk's personal credit; for it was no part of his official duty to give such an order, nor did the facts exclude the presumption of personal credit. *Auty v. Hutchinson*, 6 C. B. 266.

The defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a "handsome present;" it was held that this was evidence on which the plaintiff might recover a reasonable recompense for work and labour. *Jewry v. Busk*, 5 Taunt. 302. But where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed

right," it was held that an action would not lie to recover a recompense. *Taylor v. Brewer*, 1 M. & S. 290; see *Roberts v. Smith*, 4 H. & N. 315; 28 L. J., Ex. 164. There is no implied promise to pay an arbitrator for his trouble. *Virany v. Warne*, 4 Esp. 47. But see *Swinford v. Burn*, Gow, 8 per Dallas, C. J., *contra*; and *In re Coombs*, 4 Exch. 839; *Hoggins v. Gordon*, 3 Q. B. 466. A master may sue for the work and labour of his apprentice, against a person who harbours him after his desertion; for he may waive the tort. *Foster v. Stewart*, 3 M. & S. 191. A barrister cannot recover, even on an express contract to remunerate him for professional services rendered as a barrister; *Kennedy v. Broun*, 13 C. B., N. S. 677; 32 L. J., C. P. 137; *Mostyn v. Mostyn*, L. R., 5 Ch. 457; see also *Broun v. Kennedy*, 33 Beav. 133; 33 L. J., Ch. 71; but he may recover on an express contract, for services rendered to the guardians of a union as returning officer. *Egan v. Kensington Union*, 3 Q. B. 935, n., Ld. Denman, C. J. A physician might, at common law, recover his fees, on an express contract to remunerate him. *Veitch v. Russell*, 3 Q. B. 928; and see, since the Medical Act, *ante*, pp. 460, 461. Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it, it was held that the plaintiff could not recover from the defendant a compensation for such services; for there was no privity between them. *Schnaaling v. Thomlinson*, 6 Taunt. 147. See further, cases cited *post*, p. 539. Where the plaintiff, having a contract jointly with A., to do certain work for a company, assigned the contract to A., with the company's consent, on a promise by A. to pay plaintiff a certain sum when the contract was completed, and the contract was afterwards abandoned as between A. and the company and replaced by another; held that the plaintiff could not sue A. for the money upon the completion of the substituted contract. *Humphreys v. Jones*, 5 Exch. 952.

A sheriff cannot sue a solicitor for his fees for executing a writ of execution, unless there are special circumstances from which a jury may infer an undertaking to pay them. *Maybery v. Mansfield*, 9 Q. B. 754. Nor can the sheriff's officer who executed the writ maintain the action; *Royle v. Bushby*, 6 Q. B. D. 171, C. A.; unless the solicitor directed that that officer should execute it, in which case such undertaking is inferred; *Foster v. Blakelock*, 5 B. & C. 328. The officer must sue the solicitor who employed him, and not his client. *Walbank v. Quartermann*, 3 C. B. 94; *Maile v. Mann*, 2 Exch. 608.

Where an architect is employed by the owner to draw plans, and obtain tenders for the execution of works, it is usual for him to employ a surveyor to take out the quantities, who is to be paid by the builder whose tender is accepted; if, however, by the act of the owner the work does not proceed, the latter is bound to pay the surveyor for taking out the quantities. *Moon v. Whitney Union*, 3 N. C. 814.

As to when a claim for work and labour, and when one for goods sold and delivered is applicable, the rule is thus laid down: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials he may maintain an action against you for work and labour. But, if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered, or (if the employer refuses to accept) a special action on the case for such refusal; but he cannot maintain an action for work and labour;" per Bayley, J., in

Atkinson v. Bell, 8 B. & C. 277, 283. See also *Cotterell v. Apsey*, 6 Taunt. 322; *Heath v. Freeland*, 1 M. & W. 543; and cases cited, *ante*, p. 470; the power of amendment renders these distinctions less material than they were formerly; it must, however, be remembered that if the claim is not properly made for work and materials, but for not accepting a chattel, it may be defeated by a defence under the Stat. of Frauds, s. 17, *vide ante*, pp. 469, 470.

A contract for work and materials supplied in and about the work is not within sect. 17 of the Stat. of Frauds, *ante*, p. 469. It may be within sect. 4, *ante*, p. 468, if it must continue beyond a year; but not if it will not necessarily continue beyond the year. See cases cited, *ante*, pp. 468, 469.

Liability of defendant—Repairs of Ships.] The owner is liable for necessary repairs done, or supplies provided for a ship by the master's order. *Webster v. Seekamp*, 4 B. & A. 352; those are necessary which the owner as a prudent man would have himself ordered, although not absolutely necessary. S. C. *Id.*; *The Riga*, L. R., 3 Adm. 516. The plaintiff must prove that the goods supplied are necessities. *Mackintosh v. Mitcheson*, 4 Exch. 175; *Gunn v. Roberts*, L. R., 9 C. P. 331; and that neither the owner nor his recognised agent, able to obtain supplies, was present at the port. S. C. *Id.* Where the master dies during the voyage the mate becomes master, and is consequently invested with the incidents of the post. *Hanson v. Royden*, L. R., 3 C. P. 47. Registered ownership—that is, proof of registration; see 17 & 18 Vict. c. 104, and 18 & 19 Vict. c. 91, is *prima facie* evidence of the liability of those parties for the repairs of the ship. *Cox v. Reid*, Ry. & M. 199, and see *Hibbs v. Ross*, L. R., 1 Q. B. 534, where the former cases are considered. Such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship; *Young v. Brander*, 8 East, 10; *Jennings v. Griffiths*, Ry. & M. 42. The true question in cases of this description is, "Upon whose credit was the work done?" S. C. *Id.* 43, *per* Abbott, C. J. Even although the order was given by A., who without the defendant's knowledge or authority was registered under the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 36, as managing owner. *Frazer v. Cuthbertson*, 6 Q. B. D. 93. Where the owner A. agreed to sell to B., who appointed T. to be master, and he was registered as such, and plaintiff did repairs on the order of T., A. was held not liable, he not having done anything to sanction T. appearing as his master. *Mitcheson v. Oliver*, 5 E. & B. 419; 25 L. J., Q. B. 39, Ex. Ch. See *Frost v. Oliver*, 2 E. & B. 301; 22 L. J., Q. B. 353; *Preston v. Tamplin*, 2 H. & N. 684; 27 L. J., Ex. 192; *The Gt. Eastern*, L. R., 2 Adm. 88; and *Burdick v. Lordan*, W. N. 1878, p. 129, C. A. A person who takes a share in a ship under a void conveyance is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as (that is, by acts or words assumes the character of) owner. *Harrington v. Fry*, 2 Bing. 179. An undertaking by the defendant's solicitor "to appear for Messrs. T. & M., joint owners of the sloop A.," is evidence against the defendants of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. A part owner of a ship is not necessarily a partner; and if, as ship's husband, he has fitted her out, he may sue the other part owners separately for their shares of the expense. *Helme v. Smith*, 7 Bing. 709.

Whether a mortgagee of a ship, before possession, was liable to repairs was formerly much doubted; *Briggs v. Wilkinson*, 7 B. & C. 30; but now when a transfer is made only by way of mortgage in the manner specified in the Act, 17 & 18 Vict. c. 104, ss. 66, *et seq.*, the mortgagor continues

owner, except so far as may be necessary for making the ship available as a security for the mortgage debt. And when a mortgagor has been allowed by the mortgagee to continue in possession and to use and navigate the ship, and the mortgagor orders necessary repairs to be done, the shipwright has a lien as against the mortgagee for his work and labour. *Williams v. Allsop*, 10 C. B., N. S. 417; 30 L. J., C. P., 353; see *Johnson v. R. Mail S. Packet Co.*, L. R., 3 C. P. 38.

Work as agents.] Generally a commission to sell may be revoked, and the death of the principal is a revocation; *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J., C. P. 13; and the agent is not necessarily entitled to any remuneration, unless he can show that he has been put to expense or trouble before the revocation, from which a contract to pay on a *quantum meruit* may be implied; and a private sale by the principal without his agent's instrumentality, will not entitle him to his commission on the price. *Simpson v. Lamb*, 17 C. B. 603; 25 L. J., C. P. 113. And where an estate agent is to receive a certain percentage for finding a purchaser, he is entitled to nothing if he fails to find one before his authority is revoked; but if he finds one, and the seller is unable or unwilling to complete the sale, the agent may recover on a *quantum meruit* at least for his labour, if not the whole stipulated percentage; *Prickett v. Badger*, 1 C. B., N. S. 296; 26 L. J., C. P. 33; and in such a case the title to remuneration is not a question for the jury, but of law. S. C. But where the defendant contracted with the plaintiff to sell tickets for the defendant at a certain percentage, and the defendant afterwards revoked the plaintiff's authority before any were sold, but after some trouble had been taken and expense incurred by him, and the plaintiff acquiesced in the revocation, it may be left to the jury whether there was a rescission by consent, and a new contract to pay for past labour on a *quantum meruit*. *De Bernardy v. Harding*, 8 Exch. 822; 22 L. J., Ex. 340. As to the right of an auctioneer to remuneration where his authority has been revoked before the auction, see *Rainy v. Vernon*, 9 C. & P. 559, *cor. Ld. Denman, C.J.* The plaintiff was to place the shares of the defendant's company, for 100*l.* down and 400*l.* when they had been allotted; before they were all allotted the directors caused the company to be wound up: held, that the plaintiff was entitled to remuneration for the work he had done, he having been prevented completing it by the act of the defendants, and the court, acting as a jury, awarded him 250*l.* *Inchbald v. W. Neilgherry Coffee, &c. Co.*, 17 C. B., N. S. 733; 34 L. J., C. P. 15. See further *Moffat v. Laurie*, 15 C. B. 583; 24 L. J., C. P. 56.

Where a broker is employed to find a buyer, he is entitled to his commission if he introduced the parties, though the principals eventually settled the terms; and, *semble*, if several brokers are employed separately, the one who first introduces the parties is entitled. *Cunard v. Van Oppen*, 1 F. & F. 716. The above was a case of shipbrokers, and was perhaps governed by the proof of custom at the trial; but in the absence of express stipulation, or of fraud, the rule seems reasonable in other like cases. The plaintiff was employed by the defendant to sell an estate for him, upon the terms of being paid commission if the estate were sold, and a fixed sum if not sold. The estate was sold by the defendant himself to a person, who had first heard of the estate being in the market from the plaintiff's advertisement. It was held that the plaintiff was entitled to the commission, the relation of buyer and seller having been brought about by what the plaintiff had done. *Green v. Bartlett*, 14 C. B., N. S. 681; 32 L. J., C. P. 261. See also *Lockwood v. Levick*, 8 C. B., N. S. 603; 29 L. J., C. P., 340, and *Mansell v. Clements*, L. R., 9 C. P. 139. It seems that the purchaser may be asked "whether, but for the plaintiff's intervention, he would have bought the property?"

S. C. See further *Tribe v. Taylor*, 1 C. P. D. 505; *Fisher v. Drewitt*, 48 L. J., Ex. 32; *Bayley v. Chadwick*, 39 L. T., N. S. 429, D. P.

Where A. employs B. to procure a loan on mortgage of A.'s property, for a certain commission, and B. procures a lender who declines to make the advance, only because of A.'s inability to give a good security, B. is entitled to the whole of the commission. *Green v. Lucas*, 33 L. T., N. S. 584, Nov. 1875, C. A.

Performance.] The plaintiff must prove a performance of the work and labour according to the terms of the contract; or if there is a deviation from those terms, an assent of the defendant to the deviation. *Vide ante*, p. 521. Thus in an action to recover the value of a riding habit, for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order. *Hayden v. Hayward*, 1 Camp. 180. So, a herald who sues for making out a pedigree, is bound to give some general evidence of the truth of the pedigree. *Townsend v. Neale*, 2 Camp. 191.

Where an agent A. has, without the knowledge of his principal B., agreed to receive from C. 3,000*l.* as profit to himself, out of a purchase by A. on behalf of B. from C.; B. on knowing of the agreement, before A. has received the 3,000*l.*, may adopt A.'s agreement and sue C. for the 3,000*l.* *Whaley Bridge, &c. Co. v. Green*, 5 Q. B. D. 109. See also cases cited *post*, p. 538.

Value.] In what manner the value of the work done is to be calculated where there is a special contract and deviations from it, has been already mentioned, pp. 509, 521. Where a tradesman finishes work differing from the specification agreed on, he is not entitled to recover the actual value of the work done; but (if anything) only the stipulated price, *minus* the sum necessary to complete the work according to the specification. *Thornton v. Place*, 1 M. & Rob. 218; *Chapel v. Hickes*, 2 Cr. & M. 214. In an action for work and labour as a surveyor or architect, in the absence of express agreement, it is a question for the jury whether the commission charged is, under the circumstances, a reasonable or unreasonable charge. *Chapman v. De Tastet*, 2 Stark. 294; *Upsdell v. Stewart*, Peake, 193.

Defence.

By Rules, 1883, O. xxi. 3, "a defence in denial must deny such matters of fact from which the liability of the defendant is alleged to arise, as are disputed." See also O. xix. r. 17, *ante*, p. 283. By r. 15, *ante*, p. 283, the defendant must plead specially all facts, not previously stated, on which he relies, and must raise all such grounds of defence as if not pleaded would be likely to take the plaintiff by surprise. And by r. 20, *ante*, p. 283, a bare denial denies the making of the contract in point of fact only, and not its sufficiency in point of law.

It is a good defence that the work was done under a special contract not executed. *Jones v. Nanney*, 1 M. & W. 333. Or, that the defendants, being a corporation, did not contract under seal, or with the formalities required by the act of incorporation. *Cope v. Thames Haven Ry. Co.*, 3 Exch. 841. So that the defendants, guardians of a union, are charged for work done by a surveyor, which it was no part of their duty to order. *Paine v. Strand Union*, 8 Q. B. 326.

If the defendant has received no benefit from the work, it having been improperly executed by the plaintiff, the latter cannot recover anything.

Farnsworth v. Garrard, 1 Camp. 38; *Montrou v. Jefferys*, Ry. & M. 317. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denev v. Daverell*, 3 Camp. 451; see *ante*, pp. 455, 456, 461. Where the plaintiff had contracted to repair completely some chandeliers for 10*l.*, and returned them incompletely repaired, in an action for work and labour it was held that the plaintiff could not recover anything, at least in this form of action, though the jury found that the repairs were worth 5*l.* *Sinclair v. Bowles*, 9 B. & C. 92, and *vide ante*, p. 521. So, where A. contracts to do work and supply materials upon the land of B. for a specific sum, *to be paid on the completion of the whole*, A. is not entitled to recover anything until the whole work is completed, unless it is shown that the performance of the contract was prevented by the default of B. *Appleby v. Myers*, L. R., 2 C. P. 651, Ex. Ch. In this case the completion of the work on the defendant's premises was prevented by a fire there, and the court held that by the contract the work to be done was entire, and that the defendant did not warrant that his premises should continue in such a state as to enable the plaintiff to do the work. But, where the contract is not thus entire, the defendant must pay *pro tanto* for the work done by the plaintiff. As where a shipwright undertook to put a ship into thorough repair, and, before the work was finished, required payment for the portion done, without which he refused to proceed, and the ship thereby lost her voyage, it was held that he was nevertheless entitled to recover for the work done. *Roberts v. Havelock*, 3 B. & Ad. 404. So, where the ship was burnt in the plaintiff's dockyard before the repairs were completed, the plaintiff was held entitled to recover for the work done. *Menetone v. Athaves*, 3 Burr. 1592. And the same principle applies where the work has been badly done. *Farnsworth v. Garrard*, *supra*. By stat. 38 & 39 Vict. c. 84, s. 5, a person having a claim against a Parliamentary returning officer for work and labour, &c., in respect of an election (except publication of the accounts), must, within 14 days after the return, send to him the particulars of the claim in writing, and he is liable only in respect of claims included in such particulars; such claims are liable to a taxation by the Mayor's Court, London, or by the County Court, which is final for all purposes.

By stat. 46 & 47 Vict. c. 51, s. 29 (2, 3), every claim against a candidate at a Parliamentary election in respect of any expenses incurred on account or in respect of the conduct or management of such election, which is not sent in to the election agent within 14 days after the return, shall be barred. By sect. 30, in the case of an action in a disputed claim for such expenses, where the defendant admits his liability, but disputes the amount, the amount is to be referred for taxation, unless the court on the application of the plaintiff otherwise directs.

Where A. engaged with defendant's landlord to build a house on defendant's land, and A. made a sub-contract with the plaintiff to do part of the work, and defendant separately agreed, to pay over to the plaintiff directly, all money due for such part of the work upon a discharge from A., it was held that the defendant's agreement did not make him liable to the plaintiff for work and labour, but only on the special agreement. *Sweeting v. Asplin*, 7 M. & W. 165. Where the plaintiff agrees to do work for a certain sum on a false representation by defendant of the quantity of work to be done, he may repudiate the contract; but if he perform it, he can only recover the stipulated sum in this action. *Selway v. Fogg*, 5 M. & W. 83.

As to defence to action by builder, that the work was done under a contract, which entitled him to payment by his employer, out of a special fund only, see *Williams v. Hathaway*, 6 Ch. D. 544.

An agent entrusted to sell land for his principal on commission, is not entitled to any remuneration if he became himself the purchaser. *Salomons v. Pender*, 3 H. & C. 639; 34 L. J., Ex. 95, citing Story on Agency, § 210. See also *Morison v. Thompson*, L. R., 9 Q. B. 480, cited *post*, p. 538.

An agent cannot recover a bribe promised to induce him to enter into a contract on behalf of his principal, even though the promise did not affect his mind, and his principal was not prejudiced. *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

As to the defence arising under the Stamp Acts to a claim for brokerage, *vide ante*, pp. 234, 248.

ACTION FOR MONEY PAID.

The plaintiff, in an action for money paid, must prove, if denied by the defendant, 1. The payment of money by the plaintiff; 2. That it was paid at the request of the defendant, and to his use.

The payment of money.] The payment must be proved as a *fact*; the admission of the payee is not admissible against the defendant, *vide ante*, p. 67. To prove, as against C., payment by A. to B. for work done by B. for A., for which C. is ultimately liable, it is sufficient to show that A. received from B. an invoice of the work done, that on Feb. 25th he sent B. a cheque for the amount, and on the next day received back the invoice from B. with a receipt, and that B. received the cheque on the 26th, at 9 a.m., and sent the receipt: the receipt is then admissible as a link in the evidence. This was held to be evidence of payment at 9 a.m. on the 26th, without producing the cheque or showing that it was honoured. *Carmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co.*, L. R., 8 C. P. 685.

The plaintiff must prove that *money* was paid; giving a security, as a bond or warrant of attorney, is not sufficient; *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & A. 51; unless, perhaps, where a bill or note is taken from the plaintiff, by a creditor as payment of the defendant's debt. *Barclay v. Gooch*, 2 Esp. 571. So, stock cannot be considered as money; *Nightingal v. Devisme*, 5 Burr. 2589; unless it be so treated by the parties, as where it was transferred to the defendant with the view to a sale for defendant's use. *Howard v. Danbury*, 2 C. B. 803.

The plaintiff must prove that the money paid was *his* money. Thus, an under-tenant, whose goods had been distrained and sold to strangers by the original landlord, for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord, in satisfaction of the rent, and never was the money of the under-tenant; *Moore v. Pyrke*, 11 East, 52; but it is otherwise where the under-tenant, or a stranger redeems his goods with his own money. *Ezall v. Partridge*, 8 T. R. 308. See *post*, p. 533, and other cases there cited.

Defendant's request.] The plaintiff must prove a request by the defendant, express or implied. *Alexander v. Vane*, 1 M. & W. 511. Thus, where the lessee is to pay the lessor's expenses of granting a lease, and the lease has been granted, the lessor may recover his own solicitor's bill as money paid to the use of the lessee. *Grisell v. Robinson*, 3 N. C. 10. A subsequent assent to the payment will be evidence of a previous request; 1 Wms. Saund. 264 b, (2); and if there be a request to pay, the plaintiff may recover the money, though the debt so paid be one that could not be

enforced; e.g. a time bargain, which as a wager is void by 8 & 9 Vict. c. 109, s. 18, *post*, p. 550. *Knight v. Cambers*, 15 C. B. 562; 24 L. J., C. P. 121; *Rosewarne v. Billing*, 15 C. B., N. S. 316; 33 L. J., C. P. 55. See also *Thacker v. Hardy*, 4 Q. B. D. 685, C. A. And where the plaintiff, at the defendant's request, has made bets for him, in the plaintiff's name, and would incur disqualification, and sustain injury, if he did not pay the losses consequent on such bets, the plaintiff has, on the bet being made, an irrevocable authority from the defendant to pay such losses. *Read v. Anderson*, 10 Q. B. D. 100. If there be no request, plaintiff cannot recover, though he has paid a legal debt of the defendant. *Stokes v. Lewis*, 1 T. R. 20. Costs and expenses, incurred by the mortgagee, in relation to the mortgaged property, cannot be recovered from the mortgagor, as money paid. *Ex pte. Fewings*, 25 Ch. D. 338, C. A.

Where, in the absence of usage, a broker purchases stock to fulfil a contract entered into by him for his principal, but which his principal refuses to make good, he cannot sue his principal in this action. *Child v. Morley*, 8 T. R. 614. So where the party to whom the stock was contracted to be sold, on the defendant's refusal to transfer, bought the stock himself, and sued for money paid, to recover the difference in the price of the stock, it was held that this action could not be sustained. *Lightfoot v. Creed*, 8 Taunt. 268. But, where there is a usage of the Stock Exchange that brokers should be responsible to each other on time contracts (*vide ante*, p. 512), and the seller's broker is obliged to pay money in consequence of his principal's default, he may reimburse himself in this form of action. *Sutton v. Tatham*, 10 Ad. & E. 27; *Bayliffe v. Butterworth*, 1 Exch. 425; *Pollock v. Stables*, 13 Q. B. 765; *Smith v. Lindo*, 4 C. B., N. S. 395; 27 L. J., C. P. 196; 5 C. B., N. S. 587; 27 L. J., C. P. 335, Ex. Ch. See *Westropp v. Solomon*, 8 C. B. 345. In such cases it is immaterial whether or not the principal knew of the usage. S. CC.; *Grissell v. Bristowe*, L. R., 4 C. P. 36, 49. It makes no difference to the broker's right to recover, that the company, in which the shares had been bought, is being wound up, and therefore the shares cannot be transferred to his principal. *Taylor v. Stray*, 2 C. B., N. S. 175, 197; 26 L. J., C. P. 185, 287; *Chapman v. Shepherd*, and *Whitehead v. Izod*, L. R., 2 C. P. 228. Where the broker, who had been authorized to buy shares at a certain price, was called upon by the seller, according to the rules of the Stock Exchange, to repay him a call due after the sale, and paid by the seller in order to enable him to transfer the shares, the principal was held liable over to the broker in this action. *Bayley v. Wilkins*, 7 C. B. 886. In the event of the death, bankruptcy, or insolvency of the principal, whereby he will be unable to take up the stock, which the broker has bought for him on his own credit, the broker is justified in immediately selling the stock, and claiming the difference against the bankrupt's estate, subject to a set-off for any loss arising to the estate from such sale being made before the settling-day, the customary time for selling out stock, on default of the principal to take it up, (*vide ante*, p. 516); *Scrimgeour's Claim*, L. R., 8 Ch. 921; see also *Crowley's Claim*, L. R., 18 Eq. 182. Where the broker is, otherwise than through the fault of his principal, unable to meet his engagements, and thereby becomes a defaulter under the Stock Exchange rules (r. 171 of 1883, *ante*, p. 518), and his contracts are closed in accordance with those rules, his principal is not bound to indemnify him against the loss thereby occasioned to him. *Duncan v. Hill*, L. R., 8 Ex. 242, Ex. Ch.

There is an implied agreement between the original lessee and each successive assignee of a term, that the latter shall indemnify the former from liability on breaches of the covenants of the lease during the possession of the assignee; such agreement is implied, although each assignee expressly covenants to indemnify his immediate assignor against all subsequent

breaches; the lessee is in the position of a surety to the lessor for the assignee. *Moule v. Garrett*, L. R., 5 Ex. 132; L. R., 7 Ex. 101, Ex. Ch.; and see *Roberts v. Crowe*, L. R., 7 C. P. 636, per Willes, J.; and *Crouch v. Tregonning*, L. R., 7 Ex. 88. As to recovery by lessee against the assignee under this indemnity, of costs, to which he has been put by the action against him, by the lessor for breaches of covenant, see *Howard v. Lovegrove*, L. R., 6 Ex. 43.

A legal obligation to pay for another's benefit will be equivalent to a previous request; as where one person is surety for another, and is called on to pay, the money paid may be recovered, though not paid by the desire of the principal; per *Ld. Kenyon, Ezall v. Partridge*, 8 T. R. 310. See also *Johnson v. R. Mail S. Packet Co.*, L. R., 3 C. P. 38. So if one co-bail pays the whole debt. *Beildon v. Tankard*, 1 Marsh. 6. So, if an accommodation acceptor is sued on default of the drawer to pay, the acceptor may recover in this action; and he may sue alone though the loan was in fact advanced on account of the plaintiff and his partner, and paid out of their joint funds. *Driver v. Burton*, 17 Q. B. 989; 21 L. J., Q. B. 157. So the indorser of a bill, who has been sued by the holder, and paid him part of the amount of the bill, may recover that amount, in an action for money paid against the acceptor. *Pownall v. Ferrand*, 6 B. & C. 439. See also *Ex pte. Bishop*, 15 Ch. D. 400, C. A., whence it appears that the indorser may also recover the interest which he has been compelled to pay. But if the drawer voluntarily pays the holder of a bill, which he had drawn and indorsed for the accommodation of the acceptor, without having received any notice of dishonour or any request from the acceptor to pay it, he cannot sue the latter for money paid; for there must be either legal obligation or request. *Sleigh v. Sleigh*, 5 Exch. 514. A person who pays a bill for the honour of one of the parties to it, may sue him for money paid. But he must prove noting or protest before the payment. *Vandewall v. Tyrrell*, M. & M. 87, as explained in *Geralopulo v. Wieler*, 10 C. B. 707; 20 L. J., C. P. 105. When an executor has paid legacies in full, and is afterwards obliged to pay the legacy duty, it was held, in *Foster v. Ley*, 2 N. C. 269, that he might recover the amount paid for duty in an action for money paid against the legatee. See *Bate v. Payne*, 13 Q. B. 900.

Where several are sureties, and one is compelled to pay the whole, he may recover in this action from each of his co-sureties a rateable proportion of the money so paid. *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Winchelsea*, El., Id. 270. A co-surety may sue as soon as he has paid more than his rateable share, but not till then. *Davies v. Humphreys*, 6 M. & W. 153, 168, 169; *Ex pte. Snowden*, 17 Ch. D. 44, C. A. He may pay the debt when due, without waiting for a demand or an action, and may then sue for contribution. *Pitt v. Purssord*, 8 M. & W. 538. The amount recoverable from each co-surety is ascertained by reference not to the number of principals, but to the number of sureties; *Kemp v. Finden*, 12 M. & W. 421; and at law, the contribution was in proportion to the number of the co-sureties, without regard to their solvency; *Cowell v. Edwards*, 2 B. & P. 268, 269; *Browne v. Lee*, 6 B. & C. 689, 696; but in equity he was entitled to contribution, taking into account the numbers of solvent co-sureties only. *Peter v. Rich*, 1 Ch. Rep. 19; *Hole v. Harrison*, 1 Ch. Cas. 246; *Dallas v. Walls*, 29 L. T., N. S. 599, L. C. & L. J. J., M. T. 1873. See notes to *Deering v. Winchelsea*, El., *supra*, and *White and Tudor's Lead Cases* in Equity, 3rd ed. p. 95. Under the J. Act, 1873, s. 25 (11), *ante*, p. 282, the rule of equity now prevails. Where A., B., and C. became sureties for D. by three separate bonds, and one of them was compelled to pay D.'s debt, each of the others must contribute, in proportion to the amount in their respective bonds. *Deering v. Winchelsea*, El. of, *supra*. And even

although A. did not know, when he became surety, that B. and C. were also sureties. *Craythorne v. Swinburne*, 14 Ves. 160, 165, per Ld. Eldon, C. A surety A. is entitled to the benefit of any security his co-surety B. has taken from the principal debtor C., although B. consented to be surety, only on the terms of having the security, and A. when he became surety did not know of the agreement for security. *Steel v. Dixon*, 17 Ch. D. 825. See also *Atkins v. Arcedekne*, 24 Ch. D. 709. In these cases the true nature of the transaction itself is to be considered without regard to the form of the instrument by which the relation is created; *Reynolds v. Wheeler*, 10 C. B., N. S. 561, 566; 30 L. J., C. P. 350, 351, per Williams, J. Thus, where the plaintiff had drawn a bill, which C. accepted, and the defendant indorsed (both plaintiff and defendant putting their names for C.'s accommodation), the plaintiff having been obliged to pay the bill, was held entitled to recover contribution against the defendant as co-surety. *S. C.* So where the defendant and plaintiff, both indorsed a promissory note of C. as sureties for him, the defendant signing first. *Macdonald v. Whisfield*, 8 Ap. Ca. 733, P. C., ante, p. 359. Where two are jointly liable for the expenses incurred for their common benefit, and one dies, the survivor, who pays the whole, may sue the executor of the deceased for money paid for the defendant as executor. *Prior v. Hembruc*, 8 M. & W. 873; *semb. accord. Batard v. Hawes*, 2 E. & B. 287; 22 L. J., Q. B. 443. If premises are let to several persons for the use of a company or partnership of which the lessees are members, and one of them is called upon to pay rent, he may sue the co-lessees for contribution. *Boulter v. Peplow*, 9 C. B. 493; 19 L. J., C. P. 190. So, if one of a managing committee is obliged to repay a loan, borrowed for a club, by authority of the committee, he may recover contributions from each of the others. *Mountcashel, El. of, v. Barber*, 14 C. B. 53; 23 L. J., C. P. 43. If one partner advances to another the capital which the latter is to contribute to the joint capital, he may sue for the amount. *French v. Styring*, 2 C. B., N. S. 357; 26 L. J., C. P. 181. A partner who pays a note, in which he has joined some of the other partners, may sue them for contribution in this action, though the money raised on it was for partnership purposes. *Sedgwick v. Daniel*, 2 H. & N. 319; 27 L. J., Ex. 116. But, one partner cannot in general sue another in this form of action, for contribution to a joint partnership liability. *Brown v. Tapscott*, 6 M. & W. 119, 123; *Worrall v. Grayson*, 1 M. & W. 166. The partnership account must first be taken. One tenant in common of a house, who expends money on ordinary repairs thereon, not being such as are necessary to prevent the house from going to ruin, cannot sue his co-tenant for contribution. *Leigh v. Dickeson*, 12 Q. B. D. 194.

As a general rule, this action does not lie for contribution or indemnity against a person jointly engaged with the plaintiff in doing a wrongful act, by which the plaintiff is put to expense. *Merryweather v. Nizan*, 8 T. R. 186; or where money is paid in furtherance of an illegal transaction. *Mitchell v. Cockburne*, 2 H. Bl. 379; *Aubert v. Maze*, 2 B. & P. 371. But, where the plaintiff was not aware that the transaction was illegal, or where its nature is doubtful, he may sue on the implied contract to indemnify. *Betts v. Gibbins*, 2 Ad. & E. 57; *Pearson v. Skelton*, 1 M. & W. 504; and see *Dixon v. Fucus*, 30 L. J., Q. B. 137; 1 Smith's Lead. Cas., notes to *Lampleigh v. Braithwait*; and *post*, pp. 550, 551.

A notice to the party by whom an indemnity is given is not necessary before defending an action; but if such notice is given, and he refuses to defend the action, he is estopped from saying that the person indemnified was not bound to pay the money. *Duffield v. Scott*, 3 T. R. 374; and see *Jones v. Williams*, 7 M. & W. 493. The only effect of want of such notice is to let in proof that the course pursued was not justified under the circum-

stances, but the onus lies on the person indemnifying. *Smith v. Compton*, 3 B. & Ad. 408. And if knowledge of an action be brought home to the party indemnifying, and he leaves the defence to the party indemnified, the latter is not bound to defend, but may compromise the action to the best of his judgment, and sue for money paid, though the action might perhaps have been defended with success. *Pettman v. Keble*, 9 C. B. 701; 19 L. J., C. P. 325. A *cestui que trust* cannot, however, recover against his trustee, what he alleges he has been compelled to pay, through a breach of trust by the trustee, without showing that the loss was in fact occasioned by such breach of trust. *Parker v. Lewis*, L. R., 8 Ch. 1035, 1056. Where an action is brought against a surety who lets judgment go by default, there being no good defence, he cannot recover the costs, unless the writ was the first notice of default; in which case the costs of the writ can be recovered. *Pierce v. Williams*, 23 L. J., Ex. 322. But where A. who is indemnified by B. reasonably defends an action, he may recover against B. the costs of such action. *Hornby v. Cardwell*, 8 Q. B. D. 329, *per* Brett and Cotton, L.JJ.

To support this action, it must appear, either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred, by the plaintiff at his express or implied request, or on his guarantee. See *Brittain v. Lloyd*, 14 M. & W. 762; *Lewis v. Campbell*, 8 C. B. 541. Therefore where the goods of A. on the premises of B. are distrained for rent, and A. is obliged to pay the rent to redeem them, B. is liable to A. in this form of action, for the sum so paid; *Ezall v. Partridge*, 8 T. R. 308; so where the tenant is compelled to pay landlord's tax by distress, the action lies. *Dawson v. Linton*, 5 B. & A. 521. So, too, when the tenant of land, liable by prescription to repair a public bridge, is fined for non-repair on indictment, he may reimburse himself by this action against his landlord; *per cur.*, *Baker v. Greenhill*, 3 Q. B. 163. So in cases of rates levied on the lessee in respect of such liability, if he has not covenanted to pay them. *Id.*

But where A.'s goods are seized on the land of B. for a tithe rent-charge, B. is not liable to indemnify A., for the rent-charge issues only out of the land and is not a personal charge on B. *Griffinhoofe v. Daubuz*, 5 E. & B. 746; 25 L. J., Q. B. 237, Ex. Ch. So, where A. and B. were under-tenants of adjoining houses which were held of the freeholder under one lease, and A. was compelled to pay the whole rent reserved by that lease, he could not sue B. at law, for a contribution as money paid to his use. *Hunter v. Hunt*, 1 C. B. 300. The remedy of A. was in equity; *vide* S. C., and is therefore now at law also. J. Act, 1873, s. 24, *ante*, pp. 280, 281. If the plaintiff allows his goods to remain on the defendant's premises with his knowledge, but without his express request, until rent becomes due, and the landlord distrains, he cannot recover from the defendant the rent and expenses he so pays. *England v. Marsden*, L. R., 1 C. P. 529.

Where A. paid the funeral expenses of his deceased daughter during her husband's absence, the husband was held liable to A. *Jenkins v. Tucker*, 1 H. Bl. 90; *accord. Ambrose v. Kerrison*, 10 C. B. 776; 20 L. J., C. P. 135. So, where the wife was living apart from her husband, and the plaintiff, in whose house she died, knew where he was and did not apply to him before burying her. *Bradshaw v. Beard*, 12 C. B., N. S. 344; 31 L. J., C. P. 273.

But, it is not sufficient that the defendant has agreed with the plaintiff to pay the money to the third party. Thus where the landlord is called upon to pay the taxes, to which a landlord is primarily liable, but which his tenant is, by special agreement, bound to pay, he cannot sue the tenant for money paid. *Spencer v. Parry*, 3 Ad. & E. 331; and see *Lubbock v. Tribe*, 3 M. & W. 607. So, where the transferee of shares in a company omits to

register the transfer, and the transferor is consequently obliged to pay calls subsequent to the sale, he cannot recover the amount from the transferee as money paid; but a special action for not registering is the proper remedy; *Sayles v. Blane*, 14 Q. B. 205; *aliter*, if the defendant has requested the plaintiff to pay. See *ante*, p. 514.

An accommodation acceptor, who has defended an action on the bill at the request of the drawer, may recover the costs of such action as money paid. *Hoves v. Martin*, 1 Esp. 162; *accord. Garrard v. Cottrell*, 10 Q. B. 679. And such request is, it seems, implied. See *Stratton v. Mathews*, 3 Exch. 48, following *Jones v. Brooke*, 4 Taunt. 464. But the indorser of a bill who has been sued by the holder and paid the amount, cannot recover the costs of the former action; for the custom of merchants does not make an acceptor liable for the costs of actions against subsequent holders. *Dawson v. Morgan*, 9 B. & C. 618. Bail may recover, as money paid, the expenses incurred by them in taking their principal; but not the costs of an action against them to recover these expenses unadvisedly defended. *Fisher v. Fallows*, 5 Esp. 171. If one of two parties to an award takes it up and pays the whole expense of it, the award directing each party to pay only one half, he cannot, unless the amount due has been ascertained by the award or by taxation, recover half from the other as money paid. *Bates v. Townley*, 2 Exch. 152. *Secus* when it has been so ascertained. *Semble*, S. C. Even though the submission is silent as to costs. 2 Chitty, 157, n.; 2 Tidd. 9th ed. 831; *Grove v. Cox*, 1 Taunt. 165.

Money paid lies against a shipowner for money supplied to the captain, either in a foreign or English port, for the necessary repairs or use of the ship. *Robinson v. Lyall*, 7 Price, 592. But only where the necessity is so pressing that the owner himself cannot be consulted without prejudice and delay. *Johns v. Simons*, 2 Q. B. 425.

Where a carrier, by mistake, delivered to B. goods consigned to C., and B. appropriated them, and the carrier, on demand without action, paid C. the value, it was held that the carrier might recover from B. the sum so paid, as money paid to his use. *Brown v. Hodgson*, 4 Taunt. 189. See *Sills v. Laing*, 4 Camp. 81; *Spencer v. Parry*, 3 Ad. & E. 331, 338; and *Coles v. Bulman*, 6 C. B. 184.

Generally, if a party is compelled to pay money in consequence of his own neglect, *Capp v. Topham*, 6 East, 392; or breach of duty, *Pitcher v. Bailey*, 8 East, 171; though for the benefit of another, the law implies no promise on the part of the other to repay him.

ACTION FOR MONEY LENT.

[*Evidence of loan.*] In an action for money lent, the plaintiff will have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff is not alone evidence. *Cary v. Gerrish*, *infra*. It is not sufficient merely to prove the payment of money to the defendant; for in such case the presumption is, that the money is paid in liquidation of an antecedent debt. *Welch v. Seaborn*, 1 Stark. 474. But if the plaintiff can show any money transactions between the defendant and himself from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the payment, will be evidence of a loan. *Cary v. Gerrish*, 4 Esp. 9. When a parent advances money to a child, it is presumed to be by way of gift; *per Bailey, J., Hick v. Keats*, 4 B. & C. 71. Where money is advanced by A. to B. as a

gift, B.'s assent will be assumed, but if B. decline to accept the money except as a loan, the advance becomes one of loan. *Hill v. Wilson*, L. R., 8 Ch. 688. A transfer of stock may be evidence of a loan of money. *Howard v. Danbury*, 2 C. B. 803. Where the defendant was heard to ask for a loan, and the plaintiff then handed him a bank-note, of which the amount was not shown, the plaintiff cannot recover more than 5*l.* as principal, for that is now the smallest note in circulation. *Lawton v. Sweeney*, 8 Jur. 964, M. T. 1844, Ex. An I O U is not evidence of money lent. *Semble per cur.* in *Faenmayer v. Adcock*, 16 M. & W. 449. *Contra*, *Douglas v. Holme*, 12 Ad. & E. 641, but *quere*, see 10 L. J., Q. B. 43. If A. lends money to B., who contracts "to repay on demand or to execute a mortgage," A. may recover for money lent on B.'s refusal to execute. *Bristowe v. Needham*, 9 M. & W. 729. Where the plaintiff advances money to the defendant, for which the defendant deposits a security which is to be returned "upon repayment," a return, or offer to return, is not a condition precedent to the right of recovery for money lent. *Scott v. Parker*, 1 Q. B. 809; *Lawton v. Newland*, 2 Stark. 73. Where A., at the request of B., agreed to lend C. money on D.'s guarantee, and did so, receiving the following memorandum, signed by C. and D.: "We jointly and severally owe you 60*l.*;" it was held that there was evidence of a loan to C. and D. jointly, or of an account stated with them. *Buck v. Hurst*, L. R., 1 C. P. 297. On a declaration containing special counts on debentures, and counts for money lent, and interest, the debentures were rejected as evidence on the special counts, for want of proper stamps, but were held admissible to show that they were void as debentures; and the plaintiff was, therefore, entitled to recover, on the common counts, the loan, with interest, for which the debentures had been given as collateral securities. *Enthoven v. Hoyle*, 13 C. B. 373; 21 L. J., C. P. 100. See as to interest, *Action for interest, post*, p. 553.

Where a married woman is entitled to pledge her husband's credit for necessities, money advanced her to procure such necessities, may now be recovered from her husband by the person who advanced it. *Jenner v. Morris*, 3 D. F. & J. 45; 30 L. J., Ch. 360; *Davidson v. Wood*, 1 D. J. & S. 465; 32 L. J., Ch. 400.

In ordinary trading partnerships, one partner is presumed to have authority to bind the rest, by borrowing money for partnership purposes, and the other partners will be liable to pay. *Fisher v. Tayler*, 2 Hare, 218; *Rothwell v. Humphreys*, 1 Esp. 406; Story on Partnership, s. 102. But, if one partner open a banking account on behalf of the firm in his own name, this presumption will not extend so as to bind the other partners. *Alliance Bank v. Kearsley*, L. R., 6 C. P. 433. In the case of a mining concern, carried on by a company, no such authority to borrow is to be presumed; the power must be given by the original settlement, or by the consent of every shareholder. *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 M. & W. 252; *Burmester v. Norris*, 6 Exch. 796; 21 L. J., Ex. 43. If, however, mining be carried on as a trade by an ordinary private partnership, under a deed of partnership, the ordinary authority to bind each other exists. *Brown v. Kidger*, 3 H. & N. 853; 28 L. J., Ex. 66.

A loan of money secured by a mortgage is recoverable as money lent, if there is no covenant to pay the amount. *Yates v. Aston*, 4 Q. B. 182. But where a simple loan of money is secured by a covenant to repay the money, the creditor's only remedy is on the covenant. *Edwards v. Bates*, 7 M. & Gr. 590; *Baber v. Harris*, 9 Ad. & E. 532; *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J., Ex. 150. And a mere acknowledgment, in a deed, of a debt being due will amount to a covenant to pay it, if such an intention to enter into a covenant appear on the deed; *Courtney v. Taylor*, 6 M. & Gr. 851; *Saunders v. Milsome*, L. R., 9 Eq. 573; but this is not the case

where the acknowledgment is made for a collateral purpose. *Courtney v. Taylor*, ante, p. 535; *Marryat v. Marryat*, 28 Beav. 224; 29 L. J., Ch. 665. It is a defence, that a simple contract has been subsequently merged by a security of a higher nature. *Vide, Merger*, post, p. 615. In each of the above cases an amendment would now, no doubt, be readily allowed, *vide, ante*, p. 270, and these decisions are, therefore, of much less importance than they formerly were. The defendant authorized S., his solicitor, to borrow 100*l.* on mortgage, giving him the title-deeds for the purpose. S. borrowed 400*l.* of the plaintiff, forging the defendant's signature to a mortgage deed for that amount, and appropriated the money to his own use, but afterwards advanced 190*l.* to the defendant, taking from him a mortgage to a third person; and it was held that the plaintiff had no cause of action against the defendant, even to the extent of 100*l.* *Painter v. Abel*, 2 H. & C. 113; 33 L. J., Ex. 60. Money of a customer at a banker's is money lent, and if left for six years without acknowledgment the right to recover it may be barred. *Pott v. Clegg*, 16 M. & W. 321; see *Pollard v. Ogden*, 2 E. & B. 459; 22 L. J., Q. B. 439. If notes are left by the customer, and the banker gives a receipt for the amount as cash, and the notes turn out to be worthless, the customer cannot claim credit for the amount as money lent, or had and received, unless the banker has bought the notes or committed laches. *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403. But where C., the agent of a banker B., to whom B. sent the bills of his customer A. for collection, received the amount, but failed before he remitted the proceeds to B., B. was held liable for the amount to A. *Mackersy v. Ramsay*, 9 Cl. & F. 818.

ACTION FOR MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff may be compelled by a proper defence to prove the receipt of the money by the defendant, and his own title to recover it as received for him.

This action has always been regarded as an equitable action, and was formerly held to lie whenever the defendant was "obliged by the ties of natural justice and equity to refund the money." *Moses v. Macferlan*, 2 Burr. 1012, per *Ld. Mansfield*; see *Rogers v. Ingham*, 3 Ch. D. 351. This definition was, however, found too vague, and the following cases will show the conditions necessary to sustain a claim for money had and received.

Receipt of money.] The plaintiff must prove that money has been received; and therefore an action for money had and received will not lie to recover stock. *Nightingal v. Devisme*, 5 Burr. 2589. See ante, p. 529. And it has been held that it will not lie against a *finder* of bank-notes to recover their value; *Noyes v. Price*, MS. Select Ca. 242; *Chitty on Bills*, 9th ed. 524; unless it can be shown that they have been cashed, or circumstances justify the presumption. *Chitty, ubi sup.*, citing *Longchamp v. Kenny*, 1 Doug. 138. And the value even of provincial notes, if received as money, may be recovered in this action. *Pickard v. Bankes*, 13 East, 20; *Fox v. Cutworth*, cited 4 Bing. 179. The principle of the cases is, that if a thing be received as money it may be treated and recovered as such; per *Best, C. J.*, *Spratt v. Hobhouse*, 4 Bing. 179. So the action is maintainable where the defendant has received foreign money for the plaintiff's use. See *Ehrenperger v. Anderson*, 3 Exch. 148, 156. Where a sheriff seized goods in execution at the suit and by order of A., who took by bill of sale for 256*l.*,

and the debtor's assignees afterwards recovered their value from the sheriff, it was held that though no money passed as between the sheriff and A., the sheriff might recover from A. 256*l.* as money had and received, and that the return of *feri feci* was no estoppel against setting up the right of the assignees. *Standish v. Ross*, 3 Exch. 527. And money allowed in account, under circumstances which would have entitled the party allowing it to recover it back if he had actually paid it, may be treated as paid, and may be recovered in this form of action. *Gingell v. Purkins*, 4 Exch. 720. The last two cases, however, seem to be at variance with *Lee v. Merrett*, 8 Q. B. 820. The vendee of an estate agreed with the vendor, after conveyance, to give up his claim to a moiety of the expenses in consideration of the vendor paying some other charges. Held that the vendee's attorney, who had agreed to charge the vendee nothing if the vendor refused to pay his share, might recover the amount set off, as money had and received by the vendee to his use. *Noy v. Reynolds*, 1 Ad. & E. 159. If an agent refuse to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them and received the proceeds in money. *Hunter v. Welsh*, 1 Stark. 224. Where goods are given to an agent for a particular purpose, as to sell them, there is an implied promise to account for the proceeds, in respect of which this action lies. *Wilkin v. Wilkin*, 1 Salk. 9. Where a banker A., at whose bank a bill of exchange is accepted payable, by mistake cancels the acceptance, this does not give the holder a right to sue A. for the amount of the bill as money had and received. *Warwick v. Rogers*, 5 M. & Gr. 340; *Prince v. Oriental Bank Corporation*, 3 Ap. Ca. 325, P. C.

It seems that the plaintiff must give evidence of some particular sum, otherwise he will be non-suited. *Harvey v. Archbold*, 3 B. & C. 626; *Bernasconi v. Anderson*, M. & M. 183: see *Baxendale v. Gt. W. Ry. Co.*, 14 C. B., N. S. 1, 42, 44; 32 L. J., C. P. 225, 239.

[*Receipt by the defendant for the plaintiff.*] The plaintiff must prove that it was *his* money which the defendant received. *Scarfe v. Halifax*, 7 M. & W. 288. Or that the money has been received to *his* (the plaintiff's) use by the defendant. *Kelly v. Curzon*, 4 Ad. & E. 622. The mere bearer of money from one person to another cannot be sued. *Coles v. Wright*, 4 Taunt. 198. And a mere agent who has paid money over, pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; *Horsfall v. Handley*, 8 Taunt. 136; but merely passing it in account, without new credit given, is not such a payment; *Buller v. Harrison*, Cowp. 565; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable to the true owner. *Coz v. Prentice*, 3 M. & S. 344. So if he pays it over after notice that the right to it is disputed. *Edwards v. Hodding*, 5 Taunt. 815. An auctioneer is the agent of both parties, and a deposit on a sale that goes off may be recovered from him personally. But if the deposit money is paid to the vendor's solicitor, who receives it as such, the action by vendee should be brought against the vendor, and not the solicitor; *Bamford v. Shuttleworth*, 11 Ad. & E. 926; if the vendor demand the money of the solicitor before the question as to the title is settled, the solicitor is bound to hand it over; and if he do not, interest may be recovered from the demand. *Edgell v. Day*, L. R., 1 C. P. 80. Where money, in litigation between two parties, has by consent been paid over to a stakeholder, in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor. *Ker v. Osborne*, 9 East, 378. And where money has been paid to a stakeholder, A., to abide the decision of B. as to a certain event, the amount is not recoverable until the decision of B. has been communi-

cated to A. *Wilkinson v. Godefroy*, 9 Ad. & E. 536. The decision of the umpire of a race, as to the winner, is conclusive. *Parr v. Winteringham*, 1 E. & E. 394; 28 L. J., Q. B. 123; see *Dines v. Wolfe*, L. R., 2 P. C. 280. But the jurisdiction of the umpire does not arise until the race has been run. *Carr v. Martinson*, 1 E. & E. 456; 28 L. J., Q. B. 126; *Sadler v. Smith*, L. R., 4 Q. B. 214; Ex. Ch., L. R., 5 Q. B. 40. A mere contract between A. and B., to which C. is not a party, that B. shall pay C. a sum of money, does not enable C. to sue B. therefor. *In re Empress Engineering Co.*, 16 Ch. D. 125, C. A.

In general an agent must account to his principal, and cannot set up the *jus tertii* to an action brought by the principal. *Nicholson v. Knowles*, 5 Mad. 47; *Crosskey v. Mills*, 1 C. M. & R. 298; *White v. Barilett*, 9 Bing. 378. Thus, if the master of a ship employ B. to sell a ship on an occasion that justifies the sale (as in case of irreparable damage on a voyage), the owner of the ship cannot sue B. for the proceeds after he has paid them over to the master; nor even, *ut semble*, before such payment over. *Ireland v. Thomson*, 4 C. B. 149, 171. All profits made by an agent in the course of his employment, when received by him, belong absolutely to his principal, who may maintain this action for their recovery. *Morison v. Thompson*, L. R., 9 Q. B. 480; *De Bussche v. Alt*, 8 Ch. D. 286, C. A. See also *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. D. 109, ante, p. 527. So the promoter of a company is liable to the company for all profits made by him in the formation of the company, which he did not disclose to the company. *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, C. A.; 3 Ap. Ca. 1218, D. P.; *Bagnall v. Charlton*, 6 Ch. D. 371, C. A.; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918; *Id. v. Lewis*, 4 C. P. D. 396. And a director is liable to the company, for any consideration he received from the promoter, to induce him to become a director. *Nant-y-glo &c. Ironworks Co. v. Grave*, 12 Ch. D. 738. But not for profit made, by sale of property, by him, to the company. *In re Cape Breton Co.*, W. N. 1884, p. 54, Pearson, J. An agent is in general estopped from denying the accuracy of accounts rendered by him to his principal, except in the case of an error arising by mistake. *Skyring v. Greenwood*, 4 B. & C. 281; *Shore v. Picton*, *Id.*, 715; *Cave v. Mills*, 7 H. & N. 913; 31 L. J., Ex. 265. Where an agent receives money to pay over to a third person, although he assent to hold it for that purpose, he continues to be accountable to his principal alone, until he has entered into some binding engagement with that third person, to hold the money to his use; and not until then will he be liable to the third person in an action for money had and received. *Baron v. Husband*, 4 B. & Ad. 611; *Williams v. Everett*, 14 East, 582; *Wedlake v. Hurley*, 1 C. & J. 83; *Scott v. Porcher*, 3 Mer. 652; *Brind v. Hampshire*, 1 M. & W. 365. Where money is *bond fide* received from an agent under a binding contract, it cannot in general be recovered by the principal. *Foster v. Green*, 7 H. & N. 881; 31 L. J., Ex. 158. But, if A., the clerk of B., without B.'s authority, pay money into the bank of C., having previously made an arrangement with D., the clerk of C., for some application of that money, which neither A. nor D. had authority from their masters to make, C. must refund to B. *British & American Telegraph Co. v. Albion Bank*, L. R., 7 Ex. 119, 122.

The holder of a bill cannot sue the acceptor's banker for money had and received, though the acceptor has put funds into his hands for payment on the bill. *Moore v. Bushell*, 27 L. J., Ex. 3; *Hill v. Royds*, L. R., 8 Eq. 290. But if A. send money to B. to discharge a debt owing from A. to C., and B. assent to hold the money for that purpose, and *allows C. to be told this*, C. can maintain an action against B. for money had and received. *Lilly v. Hays*, 5 Ad. & E. 548. See *Noble v. National Discount Co.*, 5 H. & N. 225; 29 L. J., Ex. 210.

A receipt signed by an agent for his principal, is not *per se* evidence to support an action for money had and received against the agent. *Edden v. Read*, 3 Camp. 339. So, where an attorney's clerk, B., in the absence of his master, J., received money due to the plaintiff, one of his master's clients, and gave a receipt, "B. for J.," and his master never returning, the clerk refused to pay over the money to the plaintiff, it was held that no action lay against the clerk, there being no privity between him and the plaintiff, and the money being rightfully received on behalf of J., who was accountable to the plaintiff for it. *Stephens v. Badcock*, 3 B. & Ad. 354. But where the defendant is a wrongdoer, as where he took money of the plaintiff found in the house of a deceased person, by direction of the executor, to whom he paid it over, he is liable, and such payment is no defence. *Tugman v. Hopkins*, 4 M. & Gr. 389. So, where the defendants *bond fide* received money from the plaintiff's wife, but without his assent, to keep for her infant child, the plaintiff can recover it. *Calland v. Loyd*, 6 M. & W. 26. In *Stead v. Thornton*, 3 B. & Ad. 357, n., the defendant received money on behalf of the assignee of a bankrupt, who was, however, insane at the time, and on his being afterwards removed, and the plaintiff appointed assignee in his stead, it was held that the plaintiff could maintain money had and received against the defendant, for he was a mere stranger, as he could not be the agent of an insane person. The directors of a company stand in the relation of agents to the company, but there is no such relation between them and persons contracting with the company. *Wilson v. Ld. Bury*, 5 Q. B. D. 518, C. A.

As to the liability of a firm of solicitors for the money of a client received by one of the partners, *vide ante*, p. 458.

Money received by a sub-agent for an agent is not in general received for the use of the principal. See *Prince v. Oriental Bank Cor.*, 3 Ap. Ca. 325, 334, following *Mackerray v. Ramsays*, 9 Cl. & F. 818, cited *ante*, p. 536. Thus, where an agent for sale, B. has by the authority of his principal, A. employed in his own name a broker or sub-agent C. to sell A.'s goods and C. has sold them, A. cannot recover the proceeds from C., without, at any rate, allowing any set-off which would have been available by C. against B. *N. Zealand Land Co. v. Watson*, 7 Q. B. D. 374, C. A.; *Kaltenbach v. Lewis*, 24 Ch. D. 54, C. A. cited *post*, p. 629. So there is no such privity between the client of a country solicitor and his London agent, as will support an action by the client for money had and received against the agent, for the proceeds of a judgment recovered in the ordinary course of business. *Robbins v. Fennell*, 11 Q. B. 248; *Robbins v. Heath*, *Id.* 257, n.; *Cobb v. Becke*, 6 Q. B. 930. See also *Peatfield v. Barlow*, L. R., 8 Eq. 61. But the circumstances of the agency may be such, that it involves an authority to the agent to appoint a sub-agent or substitute, who shall be in direct privity with the principal. *De Bussche v. Alt*, 8 Ch. D. 286, C. A. And where B. as agent for A. consigned goods to C., and by B.'s direction, C. insured them, after notice that B. had an undisclosed principal, and received the policy moneys after a claim therefor by A.; A. was held entitled to recover the moneys from B. by reason of his property in the goods, *less the cost of insurance only*. *Maspons v. Mildred*, 8 Ap. Ca. 874, D. P. See also *Kaltenbach v. Lewis*, 24 Ch. D. 54, 84, cited *post*, p. 629. As to the right to follow moneys that have been received by an agent, see *Knatchbull v. Hallett*, 13 Ch. D. 697, C. A., and specially the judgment of Thesiger, L.J., *Id.*, pp. 723, 724; and *Kirkham v. Peel*, 43 L. T. 171, T. S. 1880, M.R.: affirmed in C. A., W. N. 1880, p. 168, M.S. Where one of two tenants in common receives the whole rents of the property, the co-tenant must sue for his moiety in account, and cannot maintain money had and received. *Thomas v. Thomas*, 5 Exch. 28.

A strict trustee, who receives rents, &c., which he is bound by the trust deed to pay over to his *cestui que trust*, could not formerly be sued in this form of action by the latter for non-payment over, the plaintiff's remedy being by bill in equity; but this objection will no longer prevail. See *J. Act*, 1873, a. 24 (1), cited *ante*, p. 280.

Failure, or want of consideration.] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus, if an annuity be defective, and the deeds are set aside, the consideration money may be thus recovered. *Shore v. Webb*, 1 T. R. 732. So if one of several securities for the annuity fails. *Scurfield v. Gowland*, 6 East, 241. So if an annuity is purchased at a time when the annuitant is in fact dead, but neither buyer nor seller knows of this at the time, the buyer may recover back his money. *Strickland v. Turner*, 7 Exch. 208; 22 L. J., Ex. 115. But where an annuity for A.'s life was regularly paid up to the time of A.'s death, but no memorial of the grant of the annuity was enrolled, it was held that although the contract was void, A.'s executor could not, on that ground, recover back the consideration money as money had and received. *Davis v. Bryan*, 6 B. & C. 651. Where the annuity is set aside, and the grantee brings an action to recover the consideration money, the defendant may, on a plea of set-off, deduct the payments made by him within six years in respect of the annuity. *Hicks v. Hicks*, 3 East, 12. Where the consideration has only partially failed, the action is not maintainable. As, where a premium was paid to the defendant's testator to instruct an apprentice for six years, and the testator died at the end of one year, it was held that no part of the premium was recoverable from the executor. *Whincup v. Hughes*, L. R., 6 C. P. 78; *vide ante*, p. 465. A broker at A.'s request bought railway scrip for him; before the day of account the company converted the scrip into shares, and made a call; held, that A. was bound to accept the shares and pay the call, and could not repudiate the contract and recover back the price. *McEwen v. Woods*, 17 Q. B. 13. As to the recovery of freight, paid under a divisible contract for carriage, the goods having been lost; see *Greeves v. W. India, &c. S. Ship Co.*, cited *post*, p. 565.

If A. sells to B. a bill as a foreign bill of exchange, which turns out to be an English bill and unavailable for want of a stamp, B. may recover the price in this action, both being ignorant of the defect; but if it had really been a foreign bill, with some latent defect which made it worthless, B. could not have recovered, unless there was a warranty or fraud. *Gomperts v. Bartlett*, 2 E. & B. 849; 23 L. J., Q. B. 65. So, if A. sell to B. a bar of brass as gold, B. may recover the price, though A. was ignorant of the fact; *per* Ld. Campbell, C.J., *Id.* 854. So, where the plaintiff bought of defendant a bill, purporting to be an acceptance of A., but which was in fact forged, he was held to recover back the money paid, although there was one genuine though worthless indorsement. *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J., Q. B. 46. Where plaintiff, a stockbroker, sold for defendant foreign bonds, which proved to be defective for want of a foreign stamp, and the bonds were afterwards returned on that account by the purchaser, whereupon plaintiff took them back and reimbursed the purchaser, it was held that money had and received was maintainable against the defendant for the amount of purchase-money paid over to him by the plaintiff. *Young v. Cole*, 3 N. C. 724. The defendant, a broker, received 800*l.* from the plaintiffs to purchase a certain number of bales of cotton, and he made a contract in his own name for a larger number, it was held that as the defendant had not made a contract upon which the plaintiffs could sue, they could recover the money back. *Bostock v. Jardine*, 34 L. J., Ex. 142, mis-

reported in 3 H. & C. 700; see L. R., 7 C. P. 101, *per* Mellor, J. Where A. has conveyed land on sale to B., and B. is evicted by C. owing to a defect in A.'s title, B.'s only remedy against A. is on A.'s covenants. *Clare v. Lamb*, L. R., 10 C. P. 334. See further, *ante*, pp. 300, 301.

Where shares in a company have been applied for and allotted, but the allottee has subsequently repudiated the shares, and his name has been removed from the register, it seems that the action lies. *Stewart v. Austin*, L. R., 3 Eq. 299. See also *Ship v. Crosskill*, L. R., 10 Eq. 73; *Alison's case*, L. R., 9 Ch. 1, 26. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in this action, recover the whole of the money advanced by him without any deduction for expenses. *Nockels v. Crosby*, 3 B. & C. 814. So, the money paid for the purchase of shares in a joint-stock company may, under similar circumstances, be recovered from the person of whom the shares were bought. *Kempson v. Saunders*, 4 Bing. 5. So, a deposit on shares in a projected company, subsequently abandoned, may be recovered from one of the acting committee. *Walstab v. Spottiswoode*, 15 M. & W. 501. But, the action must be against a party, or one of the parties, who received the money or sanctioned the application of it. Payment to the bankers named in a letter of allotment "to the credit of the company," of which the defendant is an active managing director, is a payment to him. *Moore v. Garwood*, 4 Exch. 681. It is not enough to show that the defendant was a provisional committee-man and chairman of the managing committee, if he never in fact concurred in their acts, though he may have been present at a meeting of them, from whose proceedings, however, he dissented. *Burnside v. Dayrell*, 3 Exch. 224. But, on a failure of the project, a deposit applied to expenses actually incurred, with the plaintiff's authority, cannot be recovered. *Willey v. Parratt*, *Id.* 211. It is otherwise if paid without his authority. *Moore v. Garwood*, 4 Exch. 681, 690. Where payment of the deposit by the plaintiff was made "subject to the provisions of the subscriber's agreement," and no such agreement was then in existence; but one was subsequently made, which improperly authorized payment of expenses out of the deposits, and which was not signed by the plaintiff, the plaintiff may recover back the deposit in full, on proof of failure of the projected company; for he neither assented, nor could be required to assent, to such an agreement. *Ashpittel v. Sercombe*, 5 Exch. 147. Inability to establish the company after a reasonable lapse of time, is evidence of an abandonment of the scheme. *Chaplin v. Clarke*, 4 Exch. 403. It is no answer to the action that the plaintiff signed the parliamentary and subscription contracts, if his signature was obtained by suppressing the fact that the scheme had been abandoned. *Jarrett v. Kennedy*, 6 C. B. 319; *vide post*, p. 546. Where the deposit was paid to the credit of certain persons in trust for the company, it cannot be recovered from other, though active, members of the company. *Watson v. Charlemont*, *El. of*, 12 Q. B. 856. Where all, or substantially all, of the shares in a cost-book mine are not subscribed for, and the directors are obliged to relinquish the mine for want of funds, they are liable to refund to allottees who have not authorized the working or other expenditure; and the deposits are recoverable from the directors, though they were, in fact, paid to their bankers, who were authorized to receive them, and though entered to the credit of some of the directors only. *Johnson v. Goslett*, 3 C. B., N. S. 569; 27 L. J., C. P. 122, Ex. Ch. See *Blackmore v. N. Australasian Co.*, L. R., 5 P. C. 24. The defendant sold, and the plaintiff bought, shares in

a banking company through brokers on the Stock Exchange in the usual way (*vide ante*, p. 512, *et seq.*); the defendant executed a transfer, but the requisite consent by the company to the transfer not having been given, and the company having stopped payment, and ultimately become bankrupt, the plaintiff directed his broker not to pay for the shares or accept the transfer; in obedience, however, to the decision of the Stock Exchange, the broker paid the money to the defendant's broker, who handed it over to the defendant. The plaintiff afterwards paid the money to his broker, under a threat of legal proceedings, and then sued the defendant for money had and received; it was held that the action did not lie, as there was no proof of a total failure of consideration. *Remfry v. Butler*, E. B. & E. 887, Ex. Ch.; *Stray v. Russell*, 1 E. & E. 888; 29 L. J., Q. B. 115, Ex. Ch.

Where a fixed sum has been paid to the parish by the putative father of a bastard in discharge of further liability, and the child dies, the unexpended residue may be recovered in this action. *Watkins v. Hewlett*, 1 B. & B. 1. And in *Chappell v. Poles*, 2 M. & W. 867, the balance was held recoverable, though the defendants (the overseers who had received the money) had handed over the money to their successors, the child having died during the defendants' year of office; and *semble*, the whole sum paid was money had and received to the plaintiff's use from the time it was so paid; such contract being illegal and void. *Ibid.*

If A. pays B., a gratuitous bailee, money to be employed to a particular purpose, which B. neglects to do, A. may recover it back in this form of action; but *semble*, it will be otherwise, if B. has lost it by gross negligence; for this is the subject of a special action for such negligence. *Parry v. Roberts*, 3 Ad. & E. 118. Where the plaintiff abandons the purpose for which money was deposited with the defendant; *Baird v. Robertson*, 1 M. & Gr. 981; or countermands a direction to the defendant to pay over the money, before the defendant has paid it over or entered into a binding contract to do so; *Taylor v. Lendey*, 9 East, 49; *Fletcher v. Marshall*, 15 M. & W. 755; he may sue for money had and received. But, where money has been paid to an agent to apply in a particular manner, the principal cannot sue the agent in this form of action, for neglecting his instructions, before he has countermanded the agent's authority; *Ehrensperger v. Anderson*, 3 Exch. 148; unless there has been a total refusal on the part of the agent to perform his part of the contract. *Id.* 158. If A. give a letter of credit to B. to apply the proceeds to a specific purpose, and B. is persuaded by C., who is cognizant of the facts, to lend the money to him, and he fails to repay it, A. may sue C. in this form of action. *Litt v. Martindale*, 18 C. B. 314.

Conduct money received with a subpoena may be recovered back by the party who paid it, where the attendance of the witness has been countermanded, and he has incurred no expense. *Martin v. Andrews*, 7 E. & B. 1; 26 L. J., Q. B. 39.

In cases of forgery.] Where a party paying money upon a forged instrument, has not been guilty of any want of that caution which, in consequence of the character which he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money as money paid under a mistake. Thus a person, who discounts a forged navy bill, may recover back the money as money had and received to his use. *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157. So, in the case of forged bank-notes; *per Gibbs*, C. J., S. C.; and of Bank of England notes, the numbers of which had been altered, and payment was in consequence refused. *Leeds Bank v. Walker*, 11 Q. B. D. 84. So, where a banker by mistake paid a bill for the honour of a customer whose

name was forged, but, discovering the mistake, gave notice thereof the same morning to the holder in time to enable him to give notice of non-payment to the indorsers, it was held that the money was recoverable from the holder. *Wilkinson v. Johnson*, 3 B. & C. 428 : and see *Gompertz v. Bartlett*, and cases cited, *ante*, p. 540. So, where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money. *Fuller v. Smith*, Ry. & M. 49.

But, where the party paying the money ought to have ascertained, or is bound to know, that the handwriting is forged ; or where, by his delay in discovering his mistake, he has deprived the holder of the means of resorting to other parties on the bill, he will not be allowed to recover. Thus, where two bills were drawn upon the plaintiff, one of which he accepted and both of which he paid, and it appeared that the handwriting of the drawer was forged, it was held that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was in the drawer's hand before he accepted or paid it, and that he could not recover the amount from the payee. *Price v. Neale*, 3 Burr. 1354 ; 1 W. Bl. 390. So where a banker paid a bill to a *bonâ fide* holder, which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that the money could not be recovered from the holder ; *Smith v. Mercer*, 6 Taunt. 76 ; and the banker in such a case cannot recover, though he give notice of the forgery on the day after he has paid it ; for the holder is entitled to know whether it is to be dishonoured on the very day it becomes due. *Cocks v. Masterman*, 9 B. & C. 902. Where, a cheque, drawn by a customer upon his banker, for a sum of money, described in the body of the cheque in words and figures, was afterwards altered by the holder, who substituted a large sum for that mentioned in the cheque, in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for anything beyond the original sum. *Hall v. Fuller*, 5 B. & C. 750. But where the customer drew a cheque for 50*l.*, and left a space on the line before the fifty, and also a space between the £ and the 50, so that the person to whom it was delivered was enabled to insert *three hundred and* before the fifty, and the figure 3 between the £ and the 50, it was held that the forgery and payment were from the customer's negligence, and he must bear the loss. *Young v. Grote*, 4 Bing. 253 ; *Halifax Union v. Wheelwright*, L. R., 10 Ex. 183. See, however, *Bazendale v. Bennett*, 3 Q. B. D. 525, 533, 534, *per Brett*, L. J. The executor of A. recovered from the maker of a note, purporting to be payable to A. and B., of whom A. survived B. It afterwards appeared that A.'s name had been added by forgery, and B.'s executor thereupon sued A.'s executor for money received to plaintiff's use ; held, that he could not recover, for it was not money paid on a note to which, if genuine, the plaintiff would have been entitled. *Vaughan v. Matthews*, 13 Q. B. 187. As to the liability of a banker for the amount paid or received in respect of a cheque payable to order, the indorsement of which has been forged, *vide ante*, p. 371.

As to the recovery of money obtained under a forged power of attorney, see *Stone v. Marsh*, 6 B. & C. 551 ; and *Marsh v. Keating*, 1 N. C. 198, cited *post*, p. 549.

Money paid under ignorance or mistake of facts or of law.] Money paid with a knowledge of all the facts, but under a mistake of the law, cannot in general be recovered back, there being nothing against conscience in the

other retaining it. *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143; *Barber v. Pott*, 4 H. & N. 759; 28 L. J., Ex. 381; *Rogers v. Ingham*, 3 Ch. D. 351. Thus, where the plaintiff has suffered the defendant to sell some of his property under an impression that it had passed to the defendant by deed of assignment, which was, in fact, inoperative, he cannot recover the price as money received to his use. *Platt v. Bromage*, 24 L. J., Ex. 63. But money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *Bize v. Dickason*, 1 T. R. 285; *Milnes v. Duncan*, 6 B. & C. 671. And money so paid in ignorance may be recovered back, although the defendant cannot be put *in statu quo*. *Standish v. Ross*, 3 Exch. 527. Where money was paid on account, and a dispute afterwards occurred between the parties, and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake in the hurry of business. *Lucas v. Worswick*, 1 M. & Rob. 293. And a payment, made, in *bona fide* forgetfulness of a fact, formerly known to the plaintiff, may be recovered back. *Kelly v. Solari*, 9 M. & W. 54. And, it is not enough to disentitle the plaintiff that he *might* have learnt the real fact upon inquiry, unless he has voluntarily waived all inquiry into the truth. S. C. Thus, where on the dissolution of a partnership, the plaintiff paid the defendant a sum for a share therein, on the footing of an investigation of the partnership accounts which he had made, and on further investigation he found that the profits were less than he had first estimated, so that a smaller sum than he had paid was payable to the defendant under the agreement for sale; held that the plaintiff could recover from the defendant the sum paid in excess. *Townsend v. Crowdy*, 8 C. B., N. S. 477; 29 L. J., C. P. 300. The action will lie although the position of the defendant has been altered since the payment was made, unless there is some mutual relation between the parties creating a duty on the plaintiff, breach of which disentitles him to recover. *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 234.

It has been said that before commencing the action on the ground of mistake, it is necessary to give the defendant notice of the mistake, and to demand the money. *Freeman v. Jeffries*, L. R., 4 Ex. 189, *per* Martin and Bramwell, BB. Where a bill was given by one partner for the balance of an account, alleged to be due from the partnership to the defendant, and he afterwards found that this account included a separate debt due from his co-partner, and then paid the amount of the bill to the holder, under protest, to save the drawer's credit: it was held this was not a voluntary payment, and that the plaintiff might recover from the defendant the amount of the private debt. *Kendal v. Wood*, L. R., 6 Ex. 243, Ex. Ch.

Money paid with full knowledge of facts by a person who might have resisted payment cannot be recovered back. Thus where a discharged insolvent, being lawfully arrested by one of his creditors, pays the debt, he cannot get it back in this action; and *semble*, if he had given a security for it (which would itself be void as against the statute), and paid the amount when due, he could not have recovered it back. *Viner v. Hawkins*, 9 Exch. 266; 23 L. J., Ex. 38. Where a mortgagee gave notice of the mortgage to a tenant and demanded the rent, and the tenant chose to pay it to his landlord, the mortgagor, on an indemnity which proved to be bad, it was held that he could not recover the rent back from his lessor after he had been obliged by distress to pay it over again to the mortgagee. *Higgs v. Scott*, 7 C. B. 63. The rule in equity is in general the same as at law. *Rogers v. Ingham*, *supra*; and see *Id.* 356, 357. But in the case of a common mistake of both the payer and the payee relief may sometimes be given;

see *Daniell v. Sinclair*, 6 Ap. Ca. 181, P. C. cited *post*, p. 555. Not every mistake of fact will enable the party to recover money paid in ignorance. Thus where A. conveyed to his bankers, by way of security, all his interest in a supposed devise to him, subject to a charge on it of a debt due from A. to B., and the bankers afterwards voluntarily paid to B. the debt at A.'s request, it was held that they could not recover back the money from B. upon discovering that the will had been revoked and the security was worthless. In this case the debt paid was really due to B., and the only mistake of the bankers was in supposing that they held a good security against A. for the advance. *Aiken v. Short*, 1 H. & N. 210; 25 L. J., Ex. 321. So, where bankers cash a customer's cheque, and afterwards discover that they have no assets of his, they cannot recover the money back from the person to whom they paid it. *Chambers v. Miller*, 13 C. B., N. S. 125; 32 L. J., C. P. 30; see also *Pollard v. Bank of England*, L. R., 6 Q. B. 623. See further the notes to *Marriott v. Hampton*, 2 Smith's Lead. Cas. 8th ed. 437, *et seq.*

Where money had been paid to the defendant, by the plaintiffs, on an insurance on a ship, effected by the defendant, as the agent of a foreign principal, and the defendant, when effecting the insurance, had suppressed a material fact, which, if known to the plaintiffs, would have enabled them to resist the payment, and on discovering the fact, the plaintiffs brought an action against the defendant to recover the money; it was held that the defendant, having suppressed the fact with no intention to defraud, and having paid the money over to his principals, or settled it in account with them, before demand by the plaintiffs, was not liable to refund it; *Holland v. Russell*, 1 B. & S. 424; 30 L. J., Q. B. 308; 4 B. & S. 14; 32 L. J., Q. B. 297, Ex. Ch.; *accord. Shand v. Grant*, 15 C. B., N. S. 324. Where, however, the defendant has, as principal, so received the money to which he is not entitled, it is no answer that he has paid it over to another person for whom he was acting. *Newall v. Tomlinson*, L. R., 6 C. P. 405.

Where an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back; *per Le Blanc, J., Cox v. Prentice*, 3 M. & S. 349. But if parties agree to abide by the weighing of any article at any particular scales, and, in the weighing, an error, not perceived at the time, takes place from an accidental mis-reckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable; *per Le Blanc, J., and Ld. Ellenborough, C. J., Ibid.* In that case a bar of silver, having been assayed by a third person, was bought of the defendant by the plaintiff, and paid for according to the assay, but it turned out that the assay was wrong, and the bar contained less silver; it was held that the plaintiff could recover what he had overpaid.

Though this action will not lie for the purpose of determining a right to an interest in land, *Lindon v. Hooper*, Cowp. 414, yet where the title is not in issue, it will often lie to recover back payments made under misapprehension of title. Thus, a tenant who paid rent to his landlord, and was afterwards ejected by a third person, who recovered mesne profits from him, for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord, in an action for money had and received, the landlord not having set up any title at the trial of the ejectment. *Newsome v. Graham*, 10 B. & C. 234; see *Freem.* 2nd ed., 479 (d). So, where a tenant continues to pay rent to the defendant, in ignorance of the failure of a life on which his lease depends, he may recover back the payments, there being no dispute about title. *Barber v. Brown*, 1 C. B., N. S. 121; 26 L. J., C. P. 41.

As to money had and received on rescinding a contract, or on breach of warranty, see *ante*, pp. 301, 438.

Money obtained by fraud, duress, &c.] Where money has been obtained by fraud, this action lies to recover it back; and money, fraudulently obtained, may be recovered, although the defendant may be entitled to it as legatee. *Crockford v. Winter*, 1 Camp. 124. After the death of a bankrupt, tenant for life, his assignees were allowed to recover, as money had and received, the bygone rents from a person who had received them under the colour of a fraudulent assignment. *Pearce v. Day*, cited 2 Russ. & Myl. 124. If A., by means of a false pretence, or a promise, or condition which he does not fulfil, induces B. to give him a cheque, and hands it over to C., in fraud of B., but C. takes it *bond fide* for value, and obtains cash for it at B.'s bankers, B. cannot recover the money from C. *Watson v. Russell*, 3 B. & S. 34; 31 L. J., Q. B. 304; Ex. Ch., 5 B. & S. 968; 34 L. J., Q. B. 93. Where the defendant, being secretly married already, married the plaintiff, and received the rents of her lands, they were held recoverable in this form of action. *Hasser v. Wallis*, 1 Salk. 28. Where A. is agent of B. to pay certain acceptances of B., and the defendant obtains payment from A. by falsely representing himself to be the holder of one of the securities, the action for money had and received will lie at the suit of A., or *semble* of B. also. *Holt v. Kly*, 1 E. & B. 795. In *Gorett v. Hopgood*, Exeter Sp. Assizes, 1852, *cor.* Erle, J., the plaintiff, a lady, imbecile from age and infirmity, recovered in this form of action a large sum which was alleged to have been a gift by her to the defendant's wife. The plaintiff, being herself called as a witness, showed her incapacity on her examination, and the judge left it to the jury, to say whether she knew what she was about when she gave the money. Where the defendant fraudulently colluded with J. S., who was insolvent, to obtain wines from the plaintiff, the proceeds on the re-sale of which eventually came into the defendant's hands in satisfaction of a debt due to him from J. S.; the plaintiff was held entitled to recover in this action. *Abbotts v. Barry*, 2 B. & B. 369; 5 B. Moore, 98. The plaintiff can only rescind a contract on the ground of fraud when he can disaffirm the contract and remit the defendant to his former state. *Urquhart v. Macpherson*, 3 Ap. Ca. 831, P. C., and see also cases cited *infra*.

The promoters of a company advertised a large capital in 120,000 shares: the plaintiff took an allotment of 60 shares; notice was then published by the promoters that all the shares were allotted; whereupon the plaintiff paid a deposit on the shares and signed the subscription contract. He afterwards discovered that less than half the shares had been, in fact, allotted, and that the company had no funds. Held, that on this evidence of fraud he might recover back his deposit from one of the active promoters. *Wontner v. Shairp*, 4 C. B. 404. See also *Jarrett v. Kennedy*, 6 C. B. 319, cited *ante*, p. 541. If a fraudulent statement, likely to influence the plaintiff, is shown, it need not be shown positively that it did, in fact, influence; and if the statement in a public advertisement can be traced to the secretary of a company, and purports to be by order of the directors, *semb.* an express authority to publish it may be presumed. *Wontner v. Shairp*, *supra*; and see *Watson v. Charlemont*, *El. of*, 12 Q. B. 856. But, a party who seeks to repudiate shares on the ground of fraud must do so while he is in a condition to put both parties *in statu quo*. He cannot do so after the company has gone into liquidation; *Stone v. City & County Bank*, 3 C. P. D. 282, C. A.; nor after he has received dividends and has permitted the company to become incorporated under 19 & 20 Vict. c. 47. *Clarke v. Dickson*, E. B. & E. 148; 27 L. J., Q. B. 223; *Cole v. Bishop*, E. B. & E. 150, n.; *Addie v. W. Bank of Scotland*, L. R., 1 H. L. Sc. 145, 165. But he may sue for the

fraud, and so get damages; *S. C., Clarke v. Dickson*, 6 C. B., N. S. 453; 28 L. J., C. P. 225; see *post*, *Action for deceit*; and where an allottee of shares has repudiated them on the ground of fraud by the company, and his name has been removed from the register, it seems that the sum paid on the shares is recoverable in this form of action. See *Ship v. Crosskill*, L. R., 10 Eq. 73; *Askew's Case*, L. R., 9 Ch. 664, 666.

There is an important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained; for "it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." *Kennedy v. Panama, &c. R. Mail Co.*, L. R., 2 Q. B. 580, 587, *per cur.*

Where a man has been obliged involuntarily, and by wrongful duress, to pay money, it may be recovered in this action; as, where he has paid an exorbitant sum to redeem his goods from pawn; *Astley v. Reynolds*, 2 Str. 915; or, wrongful detention; *Ashmole v. Wainwright*, 2 Q. B. 837; *Green v. Duckett*, 11 Q. B. D. 275. See *Kendal v. Wood*, L. R., 6 Ex. 243, *ante*, p. 544. Plaintiff being indebted to the defendant and others, offered a composition of 5s. in the pound, which some of the creditors accepted, but the defendant refused until the plaintiff had privately given him 50l., when he executed the deed. Some of the other creditors had refused to sign unless the defendant signed, and this he knew; held that the plaintiff could recover the 50l. *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J., Ex. 362, Ex. Ch.; *In re Lenzberg's Policy*, 7 Ch. D. 650, and see *post*, p. 551. So, where a party to a reference has been obliged to pay an unreasonable charge of the arbitrator in order to take up the award; *per curiam* in *Re Coombs*, 4 Exch. 839. See *Roberts v. Eberhardt*, 3 C. B., N. S. 482; 28 L. J., C. P. 74, Ex. Ch. So, the action lies, where goods, not liable to seizure, are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson*, 4 T. R. 485; or a public officer demands and exacts an excessive fee; as a parish clerk for a search in a register; *Steele v. Williams*, 8 Exch. 625; 22 L. J., Ex. 225; or, a corporation officer extorts a fee for granting a licence; *Morgan v. Palmer*, 2 B. & C. 729; or, a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons*, 2 B. & A. 562; or, a toll-keeper exacts an illegal toll; *Parsons v. Blandy*, Wightw. 22; or, a railway company, bound by their special act to charge rates equally to all, detains or refuses to carry the parcels of a particular person until he pays an unreasonable charge. *Parker v. Gt. W. Ry. Co.*, 7 M. & Gr. 253; *Edwards v. Id.*, 11 C. B. 588; 21 L. J., C. P. 72; *Bazendale v. Id.*, 16 C. B., N. S. 137; 33 L. J., C. P. 197, Ex. Ch.; *Sutton v. Gt. W. Ry. Co.*, 3 H. & C. 800; 35 L. J., Ex. 18; L. R., 4 H. L. 226; *Bazendale v. L. & S. W. Ry. Co.*, L. R., 1 Ex. 137; *Gidlow v. Lancashire & Yorkshire Ry. Co.*, L. R., 7 H. L. 517. And this, although part of the money was received by the defendants as agents of another company and for their use. *Parker v. Bristol & Exeter Ry. Co.*, 6 Exch. 702. See further *post*, pp. 563, 564. So, [if a mortgagee with power of sale refuse to stop a sale, unless the mortgagor pays expenses not duly chargeable upon him, which the mortgagor accordingly pays under protest. *Closs v. Phipps*, 7 M. & Gr. 586. So, where a mortgagee having agreed to assign his security on payment of principal, interest, and costs, made a claim for costs to which he was not entitled, and on his refusal to execute the assignment on any other terms, the assignee, by

direction of the mortgagor, paid the sum demanded, under protest; held, that the mortgagor could recover the excess, as paid not under duress in the strict legal sense, but as paid involuntarily under undue pressure. *Fraser v. Pendlebury*, 31 L. J., C. P. 1. So, if a sheriff obtains payment by a wrongful seizure under a *fi. fa.* by a threat of selling the goods, though not liable to the execution; *Valpy v. Manley*, 1 C. B. 594; or, a solicitor illegally detains deeds till an undue claim is satisfied; *Wakefield v. Newbourn*, 6 Q. B. 276; *Turner v. Deane*, 3 Exch. 836; even though he detain them as solicitor of the third person, who had no right to payment, and though he has paid over the money to his client; *Oates v. Hudson*, 6 Exch. 346; 20 L. J., Ex. 112;—in all such cases, this action is maintainable. See also *Gibbon v. Gibbon*, 13 C. B. 205; 22 L. J., C. P. 131. And in these cases it makes no difference that the defendant, who has obtained the money as an agent, has handed it over to his principal. See *Steele v. Williams*, 8 Exch. 625, and cases cited *Id.* 629; *Oates v. Hudson*, *supra*. *Aliter*—if the agent has received, without fraud, money paid under a mistake of facts, and has paid it over to his principal, or settled it in account with him. *Holland v. Russell*, 4 B. & S. 14; 32 L. J., Q. B. 297, *ante*, p. 545; *Shand v. Grant*, 15 C. B., N. S. 324.

Personal duress will of course avoid a payment made under its influence; and the wrongful detention of the plaintiff's goods or property for the purpose of obtaining money, will, we have seen above, be ground for reclaiming the money paid under such circumstances; but this is not on the ground of duress, but because the payment is involuntary. Where there is a fair and *bona fide* agreement, to pay for redelivery of the detained goods, and no undue advantage taken, the action will not lie; for generally mere duress of goods will not avoid a contract or agreement, so as to enable a party to recover back money paid under it. See *Atlee v. Backhouse*, 3 M. & W. 650; *Skeate v. Beale*, 11 Ad. & E. 983.

A party cannot try a title to land in an action for money paid, to release goods taken as a distress by a claimant of the land. *Lindon v. Hooper*, Cowp. 414. And see the observations of the court in *Gingell v. Purkins*, 4 Exch. 725, and cases cited *ante*, p. 545. Nor can the owner of cattle, rightfully distrained damage feasant, recover in this action an excessive demand for damage, though paid under protest. *Gulliver v. Cosens*, 1 C. B. 788. So, it did not lie by a tenant against his landlord for the overplus after sale under a distress; for the proper remedy was an action for not leaving it in the hands of the sheriff or constable; *Yates v. Eastwood*, 6 Exch. 805; 20 L. J., Ex. 303; *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50; but it seems that the stat. 35 & 36 Vict. c. 92, s. 13, makes it the duty of the landlord to pay the overplus to the tenant, and this form of action is therefore now the appropriate remedy. Where an action is brought, and the defendant pays the demand "without prejudice," he nevertheless cannot afterwards recover the money so paid. *Brown v. M'Kinally*, 1 Esp. 279. So, money recovered by regular legal process, though in fact not due, cannot be recovered back in this action; *Marriot v. Hampton*, 7 T. R. 269; *Hamlet v. Richardson*, 9 Bing. 644; even though recovered after judgment by a writ fraudulently issued to levy a sum already paid by the judgment debtor. *De Medina v. Grove*, 10 Q. B. 152. But, where a certificated bankrupt, upon being arrested upon a *ca. sa.* for a debt provable under the commission, paid the money under a protest stating his bankruptcy and certificate, and warning the sheriff that he should apply to the court to have the money returned, it was held that this was not such a payment under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne v. Chapman*, 4 Ad. & E. 364. And, where defendant, knowing he had no real claim, arrested the plaintiff, a foreigner, on his

arrival from abroad, for 10,000*l.*, and, under the compulsion of a colourable legal process, extorted from him 500*l.*, "as a payment in part of the writ," the court held that this action was maintainable. *De Cadaval, Dk., v. Collins, Id.* 858.

Against officer de facto.] Though a title to land cannot, as we have seen, be tried in this form of action, a title to an office or appointment is often tried in it. Thus, the person entitled may sue a usurper of an office for the fees wrongfully received, as in the case of the disputed title to a stewardship of an honour or a court baron; *Howard v. Wood*, 2 Lev. 245; Freem. 478, and cases collected *ib.* in 2nd ed.; or office of clerk of the papers in the King's Bench office; *Woodward v. Aston*, 1 Vent. 296; or office of clerk of the peace; *Wildes v. Russell*, L. R., 1 C. P. 722; or the office of registrar of an inferior court; *Osgood v. Nelson*, L. R., 5 H. L. 636; or a rightful against a tortious guardian in socage; *obiter, per Holt, C. J.*, in *Lamine v. Dorrell*, 2 Ld. Raym. 1217; or the office of crier of a court; *Green v. Hewett*, 1 Peake, 182; or prothonotary; *Campbell v. Hewitt*, 16 Q. B. 258. And in such actions it will be sufficient to show the fees received *communibus annis*; *Montague v. Preston*, 2 Vent. 170, 171; B. N. P. 76 (e); *semb. Campbell v. Hewitt, supra*. But if there are no accustomed fees attached to the office, and the profits are only casual, as in the case of a sexton who receives only gratuities for showing a cathedral, no such action lies. *Boyter v. Dodsworth*, 6 T. R. 681. The action lies against a corporation which has taken, and wrongfully detained, fees belonging to an officer of it; *Hall v. Swansea, Mayor, &c., of*, 5 Q. B. 526; and thus the title to the office itself may be tried.

On waiver of tort.] We have seen that a taking or detention of goods from the plaintiff may be sometimes treated as a sale to the wrongdoer; *ante*, p. 493. So, a wrongful receipt by the defendant, of the proceeds of goods wrongfully sold, may be treated as a receipt to the plaintiff's use, by waiving the preceding tortious detention of them. *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Kitchen v. Campbell*, 3 Wils. 304. So, where the defendants wrongfully seized money of the plaintiff, and paid it to their joint account at a bankers, it was held that this action lay against both. *Neate v. Harding*, 6 Exch. 349; 20 L. J., Ex., 250. Where a member of the defendant's firm sold the plaintiff's government stock under a forged power of attorney, and the defendants received the price innocently, it was held that the plaintiff could recover the price in this form of action. *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 N. C. 198. The right to maintain this action seems in such cases to be founded, not on the right to treat a mere tort as a contract, but on the right to refrain from suing for the tort, and to estop the wrongdoer from setting up his own wrong to defeat the plaintiff's remedy for the proceeds. Thus, if, after a wrongful sale of goods, the owner elect to claim and to accept part of the proceeds of the sale from the wrongdoer as money paid to his use, the tort is waived, and the owner's only remedy for the residue of the proceeds is by action for money had and received. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 L. J., Ex. 164. See *Smith v. Baker*, L. R., 8 C. P. 350. Conversely, where the plaintiff has elected to treat the conversion as a tort by recovering a judgment in trover against A., he cannot, even though the judgment be unsatisfied, sue for the proceeds of the sale by A. and the defendant, which sale was the conversion complained of, although the defendant alone received the proceeds. *Buckland v. Johnson*, 15 C. B. 145; 23 L. J., C. P. 204. Such a defence will, however, require to be specially pleaded. See further notes to *Smith v. Hodson*, 2 Smith's L. Cases. and *post*, Part III, *sub tit.* *Actions by trustees of bankrupts.*

This action lies to recover money in the hands of an overseer, levied on a conviction which has been quashed. *Feltham v. Terry*, cited 1 T. R. 387.

Money stolen by the defendant from the plaintiff constitutes a debt from the defendant to the plaintiff; but the generally received opinion has been that it could not be sued for until after the prosecution of the defendant for the felony. See *Stone v. Marsh*, ante, p. 549; *Chourne v. Baylis*, 31 Beav. 351; 31 L. J., Ch. 757. And it has been held that the plaintiff would be nonsuited, where his case was founded on an unprosecuted felony; *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285. The doctrine on which these cases were grounded has, however, been said to be without legal foundation. *Wells v. Abrahams*, L. R., 7 Q. B. 554, *per cur.* See further on this subject, *Ex pte. Ball*, 10 Ch. D. 667, C. A., *Midland Insur. Co. v. Smith*, 6 Q. B. D. 561, and *Rooke v. D'Avigdor*, 10 Q. B. D. 412.

In case of wagering contracts.] By the 8 & 9 Vict. c. 109, s. 18, all wagering contracts are made null and void; and no suit can be maintained "for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made." See *Higginson v. Simpson*, 2 C. P. D. 76.

But if the party depositing the sum staked, claim it back from the stakeholder, even after the event is ascertained, but before the money is paid over, he can maintain money had and received against him. *Hampden v. Walsh*, 1 Q. B. D. 189; *Diggles v. Higgs*, 2 Ex. D. 422, C. A. Money deposited as a wager upon a lawful game or race in which the depositors are engaged does not come within the proviso in sect. 18, as "a sum of money to be awarded to the winner of any lawful game," and can, therefore, be recovered from the stakeholder as money deposited, on a void contract. S. C. overruling *Batty v. Marriott*, 5 C. B. 818; *Trimble v. Hill*, 5 Ap. Ca. 342, P. C. See also *Batson v. Newman*, 1 C. P. D. 573, C. A.

In cases of illegal contracts.] Where money has been paid in pursuance of an illegal contract, it is generally irrecoverable. See cases cited 2 Smith's Lead. Cases, 8th ed. 547, and *Lovary v. Bourdieu*, 2 Doug. 468. And there is no distinction in this respect between *mala prohibita* and *mala in se*. *Aubert v. Maze*, 2 B. & P. 371; *Cannan v. Bryce*, 3 B. & A. 179. But, in some cases it is recoverable as money had and received to the use of the party paying it, as in the following cases: see 1 H. Bl., 4th ed., 65 n.;—

1. When the contract remains *executory*, though the plaintiff and defendant be *in pari delicto*. *Tappenden v. Randall*, 2 B. & P. 467; as a deposit upon an illegal wager; *Aubert v. Walsh*, 3 Taunt. 277; *Busk v. Walsh*, 4 Taunt. 290; or on any other illegal consideration, which has not been executed. *Wilson v. Strugnell*, 7 Q. B. D. 548. *Sed quære*, whether the consideration was not executed in this case? Where the plaintiff authorized his money to be applied to an illegal purpose, he may recover it before it has been paid over or applied to such purpose. *Bone v. Ekless*, 5 H. & N. 925; 29 L. J., Ex. 438. See also *Taylor v. Bowers*, 1 Q. B. D. 291, C. A.

2. Money is recoverable from a stakeholder in whose hands it has been deposited upon an illegal consideration, though *executed* by the happening of the event upon which a wager is made; provided the money has not been paid over by the stakeholder to the other party, or was paid over after notice to the contrary. *Cotton v. Thurland*, 5 T. R. 405; *Bate v. Cartwright*, 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrill*, 1 Cr. & M. 797.

3. The money is recoverable, though the contract be executed, if the plaintiff be not *in pari delicto* with the defendant; *per* Ld. Mansfield, C. J.,

Lowry v. Bourdieu, 2 Doug. 472. As where money is extorted from the plaintiff by the threat of prosecuting a penal action against him; *Unwin v. Leaper*, 1 M. & Gr. 747; *Williams v. Hedley*, 8 East, 378; or, to induce the plaintiff to accept a composition, in common with the other creditors, on the plaintiff's debt to him. *Smith v. Bromley*, 2 Doug. 696, n.; *Atkinson v. Denby*, and *In re Lenzberg's Policy*, cited *ante*, p. 547. So, where the plaintiff gave the defendant a promissory note for the like purpose, and was compelled to pay it at the suit of a third person, to whom the defendant had indorsed it, he was held entitled to recover the amount from the defendant in this form of action. *Smith v. Cuff*, 6 M. & S. 160. But in a similar case, where the plaintiff had voluntarily paid the note to the defendant, it was held to be a voluntary payment, which he could not recover back. *Wilson v. Ray*, 10 Ad. & E. 82.

4. Money is not recoverable where the contract is executed and the plaintiff is *in pari delicto* with the defendant. *Andree v. Fletcher*, 3 T. R. 266; *Thistlewood v. Cracroft*, 1 M. & S. 500; *Stokes v. Twitchen*, 8 Taunt. 492. So, where the plaintiff has paid money to compromise a prosecution for disobeying an order of sessions, which he afterwards finds to be irregular and void, he cannot recover back his money. *Goodall v. Lombdes*, 6 Q. B. 464.

The agent of a party to an illegal contract, who receives money paid under it to the use of his principal, cannot set up the illegality of the transaction to an action brought against him by his principal. *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, *Id.* 296. But, it is otherwise where the receipt itself is illegal, and the agent is therefore also *particeps criminis*; *McGregor v. Lowe*, Ry. & M. 57; *per* Crompton, J., in *Nicholson v. Gooch*, 5 E. & B. 1016; 25 L. J., Q. B. 137.

The defence of illegality must be specially pleaded; see *Defence in actions on simple contracts*, *post*, p. 592.

[On transfer of debt by and between three parties.] Where A. was indebted to B., and B. to C., and B. gave an order to A. to pay C. the sum due from A. to B., and the order was assented to by A., on the security of which C. lent B. a further sum; it was held that, on A.'s refusal to pay, C. might maintain an action for money had and received against him. *Israel v. Douglas*, 1 H. Bl. 239; *Wilson v. Coupland*, 5 B. & A. 228; *Walker v. Rostrom*, 9 M. & W. 411; *Griffin v. Weatherby*, L. R., 3 Q. B. 753. It seems, however, that the agreement must be such that the debt due from B. to C. is thereby extinguished. *Cuzon v. Chadley*, 3 B. & C. 591; *Liversidge v. Broadbent*, *Wharton v. Walker*, *infra*; *Cochrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97. Where A., being indebted to B., gave him an order upon C., his (A.'s) tenant, to pay the amount out of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent-day C. produced the order to A., and promised him to pay the amount to B., and, upon receiving the difference between that and the whole rent, A. gave a receipt for the whole,—it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated. *Wharton v. Walker*, 4 B. & C. 163; see the principle of the cases discussed in *Liversidge v. Broadbent*, 4 H. & N. 603; 28 L. J., Ex. 332. So, where an overseer stopped part of a pauper's allowance, and engaged to pay it to the pauper's landlord for his rent, in pursuance of an understanding between the three, it was held that the landlord could not maintain money had and received against the overseer. *Blackledge v. Harman*, 1 M. & Rob. 344. Where, by the consent of all parties, the defendant is to pay to the plaintiff a debt due from defendant to A., who is the plaintiff's debtor, it lies on the plaintiff to show that there was, at the time of the agreement, an ascertained debt

due from defendant to A. *Fairlie v. Denton*, 8 B. & C. 395. A promise by A. to B. to pay money when A. receives a debt due to him from C., does not constitute an equitable assignment, so as to charge the debt in the hands of C., or to afford a defence in an action by A. against C. for the debt due to him. *Field v. Megaw*, L. R., 4 C. P. 660. But an undertaking to pay when and as received "all dividends coming to me in respect of my proof for 800*l.*, upon the estate of J. L.," operates as an equitable assignment of such dividends. *Ex pte. Brett*, 7 Ch. D. 419. A writing opening a credit for a particular sum does not constitute an equitable assignment thereof. *Larivière v. Morgan*, L. R., 7 H. L. 423. If an order given by A. to B. to pay C. a debt due from B. to A. amounts to a bill of exchange, as defined in the Stamp Act, 1870, s. 48 (*ante*, p. 225), it will in general be inadmissible in evidence unless stamped as such. *Pott v. Lomas*, 6 H. & N. 529; 30 L. J., Ex. 210. See *Griffin v. Weatherby*, *ante*, p. 551, and cases cited *ante*, pp. 227, 228. It may be observed that the Bills of Exchange Act, 45 & 46 Vict. c. 61, s. 53, provides that "a bill of itself does not operate as an assignment of funds in the hands of the drawee, available for payment thereof."

Under the J. Act, 1873, s. 25 (6), *ante*, p. 282, any absolute assignment by writing under the hand of the assignor, (not purporting to be by way of charge, only), of any debt of which notice in writing shall have been given by the debtor, is effectual to transfer the legal right to the debt and the remedies therefor from the date of the notice. An assignment by way of mortgage, is within this sub-section. *Burlinson v. Hall*, W. N. 1884, p. 61, Q. B. D.

In case of partnership.] One partner cannot sue his co-partner for his share of the profits as long as the partnership is undissolved and accounts unsettled; therefore where two persons agree to divide the profits of an agency between them, and one of them receives, on account of such agency, a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled. *Bovill v. Hammond*, 6 B. & C. 149. A transaction between partners may, however, by agreement, or a separate security, be so separated from the partnership affairs, though arising out of them, as to form the subject of an action by one against another. Such an action involves no general account. See *Jackson v. Stopherd*, 2 Cr. & M. 361; *Coffee v. Brian*, 3 Bing. 54; *Pearson v. Skelton*, 1 M. & W. 504; also cases *ante*, p. 532, *Action for money paid*, and *post*, p. 558, *Action on an account stated*.

ACTION FOR INTEREST.

Where interest is recoverable by law, it is either claimed in a special claim on an agreement—or given by way of damages by the jury, though not demanded in the claim,—or it is the subject of a separate claim for interest, which last form has been commonly adopted where the principal sum only is recoverable under another claim. Thus, as interest is not generally recoverable, at common law, on claims for goods sold, money lent or paid; *vide post*, p. 553; it is usual, if interest be due at all, to demand it in a separate claim. Gibbs, C. J., in *Maberley v. Robins*, 5 Taunt. 625, thought that a separate count was not necessary to enable the jury to give interest by way of damage even on a count to recover a deposit paid on a sale, and in cases within the statute 3 & 4 Will. 4, c. 42, *post*, p. 553, the claim seems to be superfluous, for the jury may give interest on any issue in such cases. See also *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21

L. J., C. P. 72. A claim for interest is not supported by proof that the defendant, a widow, promised the plaintiff to pay interest on a debt of her husband, if the plaintiff forbore to "proceed against her" for payment of the debt; for the debt was not *her* debt. *Petch v. Lyon*, 9 Q. B. 147.

Under this head the subject of interest will be noticed generally, and without reference to a special claim.

Interest, when recoverable, is to be calculated down to the time of final judgment. *Robinson v. Bland*, 2 Burr. 1085-8. But if there has been a tender, it runs only to the time of such tender. *Dent v. Dunn*, 3 Camp. 296. Where a principal sum is payable with interest at a fixed rate the interest ceases to accrue on the recovery of a judgment for the principal, for the contract has then passed *in rem judicatum*. *Florence v. Jennings*, 2 C. B., N. S. 454; 26 L. J., C. P. 274; *Ex pte. Oriental Financial Association*, 4 Ch. D. 33, C. A.; *Ex pte. Fewings*, 25 Ch. D. 338, C. A., distinguishing *Popple v. Sylvester*, 22 Ch. D. 98. A judgment debt bears interest at 4 per cent. under 1 & 2 Vict. c. 110, s. 17. *Ex pte. Financial Association*, *supra*.

[When due at common law.] The principle upon which interest is claimed at common law is, that it is matter of contract, express or implied, between the parties. "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade, or other circumstances"; *per Abbott, C. J., Higgins v. Sargent*, 2 B. & C. 349; *Page v. Newman*, 9 B. & C. 381; *Rhodes v. Rhodes*, Johns. 653; 29 L. J., Ch. 418; notwithstanding many older cases at variance with the rule as above stated. See *Foster v. Weston*, 6 Bing. 714; *Arnott v. Redfern*, 3 Bing. 359; *Pinhorn v. Tuckington*, 3 Camp. 468; *Swinford v. Burn*, Gow, 8. That there may be a usage to pay a certain interest on the settled balance of a merchant's account, see *Orme v. Galloway*, 9 Exch. 544; 23 L. J., Ex. 118. Where title deeds have been deposited to secure a loan the loan carries interest. *In re Kerr's Policy*, L. R., 8 Eq. 331. In an action on an undertaking to let judgment go by default in a suit for a mortgage debt, and to pay principal and interest, in consideration of staying execution for a certain time, it was held that the jury might give interest by way of damages down to the date of the verdict for breach of the agreement by non-payment; and this without the aid of stat. 3 & 4 Will. 4, c. 42. *Harper v. Williams*, 4 Q. B. 219. Where the contract is to pay a sum of money, with interest, at a given rate on a given day, if the sum be not paid on that day, there is no contract to continue to pay the same rate of interest after the day for payment; damages may, however, be awarded by the jury for the non-payment, and the former rate may be taken by them as a guide in assessing the damages. *Cook v. Fowler*, L. R., 7 H. L. 27. See also *Goodchap v. Roberts*, 14 Ch. D. 49, C. A.

The following cases in which interest was not allowed must now be taken as subject to the statute hereafter mentioned.

It has been held that interest cannot, at common law, be recovered on money received to the use of another; *De Havilland v. Bowerbank*, 1 Camp. 50; though the money was obtained by fraud; *Crockford v. Winter*, *Id.* 129; nor, for money lent, to be repaid either upon demand or at a given time; *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 351; nor, where the borrower by a written instrument promised to repay it at a certain time; *Page v. Newman*, 9 B. & C. 378; nor, on money paid; *Carr v. Edwards*, 3 Stark. 132; nor, on money due for work and labour; *Trelawney v. Thomas*, 1 H. Bl. 303; nor, on money due for goods sold and delivered to be paid for on a certain day; *Gordon v. Swan*, 12 East, 419; 2 Camp. 229, n; nor, upon a policy of insurance; *Kingston v. McIntosh*, 1

Camp. 518 ; nor, upon a policy of insurance on a life, where the money was payable six months after proof of the death ; *Higgins v. Sargent*, 2 B. & C. 348 ; nor, on a single bond ; *Hogan v. Page*, 1 B. & P. 337 ; nor, on rent ; per Tindal, C. J., *Foster v. Weston*, 6 Bing. 714 ; nor, on an instrument, "to pay 1500*l.* to be delivered in goods by three payments of 500*l.* each, at 3, 5, and 7 months." *Foster v. Weston*, 6 Bing. 709. An auctioneer employed to sell an estate, who receives a deposit from the purchaser, is a stakeholder liable to be called upon to pay the money at any time ; and, therefore, although he may make interest by it, he is not liable to pay interest to the vendor on the completion of the contract. *Harrington v. Hoggart*, 1 B. & Ad. 577. So, of an agent or banker who holds money payable at a moment's notice. See cases cited by Parke, J., S. C.

Interest in the case of mercantile instruments.] The mercantile instruments which have always been held to carry interest, whether mentioned or not, are bills of exchange and promissory notes. By the Bills of Exchange Act, 1882, s. 9 (3), *ante*, p. 320, where a bill of exchange, or promissory note, see s. 89, *ante*, p. 375, is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date thereof, and if undated from its issue ; and where interest is made payable at a certain rate, the jury may give interest at the same rate, against the drawer, from the time of being due ; *Keene v. Keene*, 3 C. B., N. S. 144 ; 27 L. J., C. P. 88 ; but the jury are not bound to give it. *Cook v. Fowler*, *ante*, p. 553. If the instrument is silent about interest, it is payable only from the time when the instrument becomes due. Upon a bill or note, payable on demand generally, not specifying interest, interest is given from the time of the demand proved ; *Blaney v. Hendricks*, 2 W. Bl. 761 ; or, dispensed with, *e.g.*, by the bank which gave the note closing its doors ; *In re East of England Banking Co.*, L. R., 6 Eq. 368 ; L. R., 4 Ch. 14 ; overruling *In re Herefordshire Banking Co.*, L. R., 4 Eq. 250. And when no demand is proved, from the issuing of the writ. *Pierce v. Fothergill*, 2 N. C. 167. Against the drawer of a bill, not mentioning interest, interest is only recoverable from the time of his receiving notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240 ; 1 Marsh. 36. It has, however, been said that, in an action on a bill not bearing interest on its face, interest is in the nature of damages, and the jury may allow it, or may disallow it in case the delay of payment has been occasioned by the default of the holder ; per Bayley, J., *Cameron v. Smith*, 2 B. & A. 308 ; *Brewerton v. Parker*, 17 L. T., N. S. 325, Byles, J. But, though the jury are to decide whether interest is to be allowed, and what is the interest current at any particular place, it is a question of law what rate of interest is to be allowed on such a bill ; therefore where the jury gave the indorsee of a bill interest at 6 per cent., in an action against the drawer on non-acceptance, and the interest at the place where it was drawn was found to be 25 per cent., it was held that the plaintiff was entitled by law to the higher rate. *Gibbs v. Fremont*, 9 Exch. 25 ; 22 L. J., Ex. 302. The indorsee of a bill may sue the acceptor for interest, although he has taken another bill from the defendant for the amount of the first, which has been duly paid. *Lumley v. Musgrave*, 4 N. C. 9.

When goods are sold to be paid for by bill, interest from the time when the bill would, if given, have become due may be recovered as part of the price in an action for goods sold and delivered. *Farr v. Ward*, 3 M. & W. 25 ; *Davis v. Smyth*, 8 M. & W. 399.

Interest implied.] A promise to pay interest may be implied from the acts of the parties. Thus, where a former balance has been settled upon an allowance of interest in a banker's book, it is an admission by the party, of

a contract to pay interest on the sums advanced to him by the banker. *Calton v. Bragg*, 15 East, 223, 228, per Ld. Ellenborough, C. J. But where the defendant undertook to transfer to plaintiff's account a sum due from defendant to A., plaintiff cannot recover interest on it merely because interest was allowed in the usual course of dealing between defendant and A. *Frühling v. Schroeder*, 2 N. C. 77.

Compound interest is not generally allowed unless the parties have expressly or impliedly contracted to pay it, or there be a custom. *Fergusson v. Fyffe*, *infra*. Even where the defendant contracted to pay money by certain instalments, and also interest on each instalment from the day appointed for payment, and to secure payment of such interest by his bond, it was held that, on default of payment, a jury was not bound, either at common law or under stat. 3 & 4 Will. 4, c. 42, s. 28, to award interest upon such interest. *Attwood v. Taylor*, 1 M. & Gr. 279. Where the plaintiffs had acted as agents for the defendant, and advanced moneys, and at the close of each account (which was delivered annually) had charged interest, and at each rest had added the interest of the preceding year to the principal, Ld. Ellenborough held that the accounts, which had not been objected to for a number of years, afforded evidence of a promise to pay interest in this manner. *Bruce v. Hunter*, 3 Camp. 467. But, where compound interest is so charged, it must appear that the debtor knew that the practice was to make such rests. *Moore v. Voughton*, 1 Stark. 487; and see *Daves v. Pinner*, 2 Camp. 486, n. And even where a mortgage debtor had settled mortgage accounts on the footing of compound interest, both he and the mortgagee being under the erroneous impression that compound interest was payable under the mortgage deed, the debtor was held entitled to have the accounts reopened. *Daniell v. Sinclair*, 6 Ap. Ca. 181, P. C.

Where, by the course of dealing between a banker and his customer, the former has charged compound interest on the amount of the customer's overdrawn account, the banker loses the right to charge compound interest when the relation of banker and customer ceases between the parties, as on the death of the customer; *Williamson v. Williamson*, L. R., 7 Eq. 542; following *Fergusson v. Fyffe*, 8 Cl. & F. 121. But it seems that the balances will carry simple interest from the customer's death. S.CC.

Interest by statute.] By stat. 3 & 4 Will. 4, c. 42, s. 28, "upon all debts or sums certain payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

By sect. 29, the jury, "may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of *trover* or *trespas de bonis asportatis*, and over and above the money recoverable in all actions on *policies of assurance* made after the passing of this Act" (14th August, 1833).

Money claimed on a special agreement in writing, to let judgment go by default, in an action against a mortgagor for principal and interest, and to pay the amount of debt and costs on a named day, if certain securities were then ready, is not a debt certain payable at a time certain within sect. 28; *semb. Harper v. Williams*, 4 Q. B. 219. The deposit paid on a consideration

that has failed may be recovered back with interest, on a previous demand of interest made under it; *Mowatt v. Londesborough*, 4 E. & B. 1; 23 L. J., Q. B. 177; claiming interest from an earlier date than the date of the demand will not vitiate it; S. C. So, interest may be recovered on an over-payment made by a person to obtain his goods from a carrier, on which an illegal charge has been made, if due demand be made under the statute. *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21 L. J., C. P. 72. A letter of application for a loan till a day certain, not showing on the face of it an obligation to repay, is not an instrument by virtue of which the debt is payable at a certain time. *Taylor v. Holt*, 3 H. & C. 452; 34 L. J., Ex. 1. A demand of payment of the balance of an account, stated therein inaccurately, is not within the statute. *Hill v. S. Staffordshire Ry. Co.*, L. R., 18 Eq. 154; *Ward v. Eyre*, 15 Ch. D. 130, C. A. In *Duncombe v. Brighton Club &c. Co.*, L. R., 10 Q. B. 371, it was held (*diss. Blackburn, J.*), that interest was recoverable, though the day of payment was not mentioned in the instrument if it could be ascertained afterwards by reference to some event, *e.g.* the delivery of goods. This decision is, however, inconsistent with that in *Merchant Shipping Co. v. Armitage*, L. R., 9 Q. B. 99, 114, Ex. Ch., where it was held that a lump sum payable for freight, under a charter-party, on the delivery of the cargo is not within the section.

A notice of a call made on a contributory of a company being wound up, stating that interest would be charged if payment were not made by a certain day, is within sect. 28. *Ex pte. Lintott*, L. R., 4 Eq. 184; *Barron's Case*, L. R., 3 Ch. 784; see *In re Welch Flannel & Tweed Co.*, L. R., 20 Eq. 360; as to interest on calls on forfeited shares, see *Stocken's Case*, L. R., 5 Eq. 6.

Interest is not payable under a policy of insurance, under sect. 29, in respect of a delay in payment occasioned only, by there being no person who could give a discharge for the amount thereof. *Webster v. British Empire &c. Assur. Co.*, 15 Ch. D. 169, C. A.

By 17 & 18 Vict. c. 90, s. 1, all acts or parts of acts of parliament mentioned in the schedule, and "all existing laws against usury," are repealed. By sect. 3, where interest was payable on August 10th, 1854, on any contract, express or implied, for payment of the legal or current rate of interest, or where interest was then payable by any rule of law, the same rate shall be recoverable as if the act had not passed. By sect. 4, nothing is to affect the law relating to pawnbrokers. See *Flight v. Reed*, 1 H. & C. 703; 32 L. J., Ex. 265, and observations thereon in *Rimini v. Van Praagh*, L. R., 8 Q. B. 1. The repeal of the usury laws does not, however, deprive the court of the power of relieving expectant heirs from unconscionable bargains. *Aylesford, El. of, v. Morris*, L. R., 8 Ch. 484. See also *Bolingbroke v. O'Rourke*, 2 Ap. Ca. 814, D. P.

ACTION ON AN ACCOUNT STATED.

By Rules 1883, O. xx. r. 8, "in every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings."

To recover upon a claim on an account stated the plaintiff must prove an

absolute acknowledgment by the defendant of the plaintiff's claim. A qualified acknowledgment is not sufficient, as "I would have paid you if you had not done so and so." *Evans v. Verity*, Ry. & M. 239. And an offer of a sum certain, on demand of a larger, is not evidence on the account stated. *Wayman v. Hilliard*, 4 Moore & P. 729; 7 Bing. 101. An entry in a bankrupt's examination of a certain sum being due to A., is not, it seems, evidence of an account stated between them. *Pott v. Clegg*, 16 M. & W. 321; and *Ex pte. Topping*, 34 L. J., Bky. 44, cited *post*, p. 614, overruling *Eicke v. Nokes*, 1 M. & Rob. 359. An oral admission of a debt due for goods sold, is evidence of an account stated, though the agreement for the sale was in writing. *Newhall v. Holt*, 6 M. & W. 662. An agreement by a member of a company, on behalf of the company, to pay the plaintiff's bill in consideration of withdrawing an attachment against the company's funds, is evidence of an account stated in an action against the member as one of the company, though the defendant became a member after the debt was incurred. *Barker v. Birt*, 10 M. & W. 61. The company in this case seems to have been an unincorporated company or trading partnership. Where a party, examined before commissioners of bankruptcy, admitted that he had received a sum on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt; held that this would not support a count on an account stated with the assignees. *Tucker v. Barrow*, 7 B. & C. 623.

A promissory note given in 1844 by the defendant for a sum described as interest on a note for 117*l.* dated 1838, is evidence on an account stated of a subsisting debt of 117*l.* due in 1844. *Perry v. Slade*, 8 Q. B. 115. An I O U is evidence of an account stated with the person who produces it, though not named in it, and if another person was meant, the defendant must prove this. *Fesenmayer v. Adcock*, 16 M. & W. 449. But it may be shown that it was given on a consideration that has failed; as for part of a deposit on a sale which has gone off for want of title. *Wilson v. Wilson*, 14 C. B. 616; 23 L. J., C. P. 137; and see *Berry v. Storey*, 2 C. L. R. 815, H. T. 1854, C. P. Where an I O U was given for a stipulated premium, extra the consideration specified in an apprenticeship deed, which was therefore void by 8 Ann. c. 9, s. 39, yet the master may recover the money under an account stated, the boy having, in fact, served out his full term. *Westlake v. Adams*, 5 C. B., N. S. 248; 27 L. J., C. P. 271. An account stated may be maintained on an oral agreement of what the balance between the parties is, though one of the items be the price of land sold under an oral agreement, whether the statement be after the land has changed hands; *Cocking v. Ward*, 1 C. B. 858; or before, if it be shown to have subsequently come into the defendant's possession; *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43. See also *Wilson v. Marshall*, *post*, p. 558. But there must be an admission of a debt due, in order to support an account stated: therefore when the defendant orally agreed to purchase a lease of the plaintiff, and gave as deposit an I O U for 25*l.*, and afterwards refused to complete the purchase: it was held that the I O U, taken with the circumstances under which it was given, was no evidence of an account stated. *Lemere v. Elliott*, 6 H. & N. 656; 30 L. J., Ex. 350. See *Buck v. Hurst*, L. R., 1 C. P. 297, *ante*, p. 535.

In an action by the plaintiff as executrix, where the defendant, on being applied to by her for the payment of interest, stated that he would bring her some, it was held that, though this was an admission that something was due, still, as the nature of the debt did not appear, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumption would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 B. & C. 235; and see *Teal v. Auty*,

2 B. & B. 101. And, generally an account is not stated unless some specific sum is agreed upon; therefore a letter asking the plaintiff "to hold the defendant's cheque till Monday, when I will send the amount," the amount of the cheque being unknown, will not support this claim. *Lane v. Hill*, 18 Q. B. 252; 21 L. J., Q. B. 318. If it appear that the account is stated of a debt due from a third person to the plaintiff, which defendant promised to pay without any consideration, this is a defence. *French v. French*, 2 M. & Gr. 644; *Wilson v. Marshall*, 1 R., 2 C. L. 356, Ex. Ch. So, where the defendant gave a written promise, to pay a debt due from her deceased husband, to the plaintiff's deceased husband with interest, this was held no evidence on a common count for interest, or on an account stated; for the debt was not due from the defendant. *Petch v. Lyon*, 9 Q. B. 147. A promissory note was found among the testator's papers, upon which the executors promised to pay it, but it afterwards appeared that it was intended as a legacy, and was not in payment of a debt: held no evidence of an account stated with the payee. *Gough v. Findon*, 7 Exch. 48; 21 L. J., Ex. 58. A written guarantee by one of several partners without the authority of the others, and a letter written by their clerk explaining it, also without the authority of all, are not evidence of an account stated by the firm. *Brettel v. Williams*, 4 Exch. 623. It is sufficient to prove the account stated without giving evidence of the several items constituting the account: *Bartlett v. Emery*, 1 T. R. 42, n.; and proof of the admission of a single item is sufficient. *Highmore v. Primrose*, 5 M. & S. 65.

Where a partnership has been dissolved and a balance struck, it may be recovered under this claim even as between partners; *Poster v. Allanson*, 2 T. R. 479; *Brierly v. Cripps*, 7 C. & P. 709; *Wilson v. Cutting*, 10 Bing. 436; and the action is then maintainable without any express promise to pay. *Wray v. Milestone*, 5 M. & W. 21. But it will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership. *Fromont v. Coupland*, 2 Bing. 170; *Goddard v. Hodges*, 1 Cr. & M. 37; *Carr v. Smith*, 5 Q. B. 198. If an account were stated of the balance due on a deed or bond, this action did not lie, for it continued to be a specialty debt. *Middleditch v. Ellis*, 2 Exch. 623.

The plaintiff may recover, though the account was, in fact, stated by the defendant with the plaintiff's wife; but not on an account stated by the wife of the defendant; *Styart v. Rowland*, B. N. P. 129; unless she is proved to be the defendant's agent in the transaction. An acknowledgment in a casual conversation with a stranger, not shown to be the agent of the plaintiff, is not sufficient. *Breckon v. Smith*, 1 Ad. & E. 488. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between the partners and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, *Ld. Kenyon* held that the whole might be given in evidence in an action by B. and C. as on an account stated. *Moore v. Hill*, Peake Ev., 5th ed., 253; see *Gough v. Davies*, 4 Price, 214; *David v. Ellice*, 5 B. & C. 196. The debt on which the account is founded may be an equitable one; thus, where a trustee holds money in trust for the plaintiff, and states an account with him and acknowledges himself a debtor for the amount, he is liable on this claim; per *Crompton, J.*, *Howard v. Brownhill*, 23 L. J., Q. B. 23, citing *Roper v. Holland*, 3 Ad. & E. 99. An account stated was formerly considered conclusive, but errors in it may now be corrected; per *Ld. Mansfield, C. J.*, *Trueman v. Hurst*, 1 T. R. 42; *Dails v. Lloyd*, 12 Q. B. 531. If the defendant accounts with the plaintiff in a particular character, he will be taken to have admitted that character. *Peacock v. Harris*, 10 East, 104.

A promissory note, if not properly stamped, cannot be given in evidence

as an admission of an account stated; *Green v. Davies*, 4 B. & C. 235; but an unstamped foreign bill of exchange drawn abroad, which has not been presented for payment, or indorsed or negotiated in the United Kingdom, can so be used. *Griffin v. Weatherby*, L. R., 3 Q. B. 753. A note, payable on a contingency, is not evidence of an account stated. *Morgan v. Jones*, 1 C. & J. 162. See further on the admissibility of bills or notes to prove an account stated, *ante*, pp. 335, 341, 355, 359, 378.

The account must be stated before the commencement of the action; and where a defendant, after action brought, had offered a cognovit, it was held insufficient evidence to support the count. *Spencer v. Parry*, 3 Ad. & E. 331; *Allen v. Cook*, 2 Dowl. 546.

Where the plaintiff relies on an account stated on one day, the defendant cannot prove, without pleading payment or set-off, a subsequent accounting including fresh items, by which the balance was turned against the plaintiff. *Fidgett v. Penny*, 1 C. M. & R. 108. But, if the second accounting was a mere correction of the first, it would be admissible. See *Thomas v. Hawkes*, 8 M. & W. 140.

Where accounts are submitted to an arbitrator, his award cannot be given in evidence as an account stated. *Bates v. Townley*, 2 Exch. 152, overruling *Keen v. Batshore*, 1 Esp. 194. But, where an incoming tenant agrees to take fixtures at a valuation to be made by brokers, and after it has been made, the tenant enters, the value so ascertained may be recovered on such a claim. *Salmon v. Watson*, 4 B. Moore, 73.

An infant cannot state a valid account; *Trueman v. Hurst*, 1 T. R. 40; but formerly it was good if ratified after full age and before action. *Williams v. Moor*, 11 M. & W. 256. The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62, *post*, p. 600), s. 1, however, makes all accounts stated with infants absolutely void, and they are therefore now incapable of ratification; see also sect. 2. No account can be stated with the agent of a lunatic, so as to bind the lunatic; nor can a lunatic state one. *Tarbut v. Bispham*, 2 M. & W. 2.

ACTIONS AGAINST CARRIERS.

Carriers may be of goods or of persons, or of both; and they may be carriers by land or by sea; or of dead or of live stock. The obligations are not the same in all these cases.

Common Carriers.

The obligation or liability of owners and masters of British seagoing ships has been already noticed under a previous head, p. 425, *et seq.*, especially with reference to the Merchant Shipping Acts, 1854, 1862.

The obligations of carriers by land are regulated in some respects by the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, which relates to their liability for loss of goods. Canal and railway companies are subject to the regulations of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, and the Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, both in respect of goods and passenger traffic, as well as to the acts relating to carriers in general, so far as they are applicable. Railway Companies are further regulated by the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119.

The Railway and Canal Traffic Act, 1854, professes only to regulate the obligations of companies as carriers on their respective rails or canals, and does not apply to other carriers using such rails or canals. Hence the obligation of these latter carriers must depend on the general law of carriers. It is presumed that carriers by inland waters are within the Land Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68; at least there appears to be no other statute specially applicable to inland navigation, except the several local or private acts under which such canals, &c., are established, and except the act 8 & 9 Vict. c. 42, by which canal companies (theretofore empowered only to take tolls) were allowed to become carriers of goods themselves, with power to make reasonable charges to be fixed by the several companies, and subject to the general laws of the realm as to the liability and protection of common carriers.

It may be observed that there is no analogy between the transmission of a telegram and the consignment of goods through a carrier; *Playford v. United Kingdom Telegraph Co.*, L. R., 4 Q. B. 706; *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62; 3 C. P. D. 1, C. A. As to letter carriers, *vide post*, p. 580.

Action for loss of, or injury to, goods.] In an action for loss of, or injury to, goods, the plaintiff will have to prove (if denied): 1. That the defendant is a common carrier: 2. The delivery of the goods for conveyance, and the contract, if special: 3. The loss or injury: 4. The damage.

Action for refusing to carry.] In this action the plaintiff will have to prove, besides the defendant's character as a common carrier, the tender of the goods to the defendant for conveyance, and the refusal of the defendant to accept the goods for that purpose, although the plaintiff was then ready and willing to pay a reasonable reward in that behalf. *Vide post*, pp. 563, 567. The action is one of tort for refusal to perform a public duty, whereby the plaintiff has sustained special damage.

Who are common carriers.] A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Coach owners are common carriers, as well as owners of carts and waggons carrying for hire. So the owners or masters of vessels, whether engaged in coasting trade or voyages beyond seas. *Morse v. Slue*, 2 Lev. 69; *Nugent v. Smith*, 1 C. P. D. 19; reversed on another ground, *Id.* 423, C. A. But this has been doubted, at any rate, unless the ship is a general ship. *Id.* 425, *per Cockburn*, C. J. See also *Benett v. Peninsula & Oriental Steam-Boat Co.*, 6 C. B. 775. So lightermen, *Maving v. Todd*, 1 Stark. 72; bargemen, *Rich v. Kneeland*, Cro. Jac. 330; and all persons who openly profess to carry goods between different places by road or water for hire are common carriers. See, however, *Liver Alkali Co. v. Johnson*, Ex. Ch., *post*, p. 561. Railway companies may become common carriers (8 & 9 Vict. c. 20, ss. 86, 89). So canal and navigation companies (*Id.* c. 42, ss. 5, 6). And such companies generally are common carriers, but only as to such things as they publicly profess to carry, or are obliged by their several acts to carry. *Johnson v. Midland Ry. Co.*, 4 Exch. 367. As to carriers of live stock, *vide post*, pp. 562, 563.

A carter undertaking jobs for special bargains, and not professing to carry generally, is not a common carrier. *Brind v. Dale*, 2 M. & Rob. 80; *Scayfe v. Farrant*, L. R., 10 Ex. 358, Ex. Ch. Nor is a wharfinger merely as such, though he has been treated as a carrier in some reported cases. See *Sideways v. Todd*, 2 Stark. 400, and cases cited 2 Kent Comm. 599, n. Nor is a London cab-driver or a hackney-coachman, plying for passengers, a

common carrier. *Ross v. Hill*, 2 C. B. 877. In cases like the last, the liability is that of an ordinary hired bailee, which falls far short of that of a common carrier. S. C.; *Coggs v. Barnard*, 2 Ld. Raym. 909. See *post*, pp. 566, 576, 577. A ferryman, though bound to carry all comers, is not therefore a common carrier. See *Willoughby v. Horridge*, 12 C. B. 751; 22 L. J., C. P. 90; *Walker v. Jackson*, 10 M. & W. 161; *contra*, 2 Kent. Comm. 599. A barge-owner who lets out his barges to all that come to him, and to only one person for each voyage, each being made under a separate agreement, the customer fixing the termini in each case, incurs the responsibilities of a common carrier, with respect to the goods he carries. *Liver Alkali Co. v. Johnson*, L. R., 7 Ex. 267; Ex. Ch., L. R., 9 Ex. 338. The Ex. Ch., however, declined to hold that he was a common carrier so as to be bound to carry all goods tendered him for carriage; and Brett, J., held that neither the defendant nor any other shipowner who carried goods in his ship, was a common carrier. See further as to carriers by ship, *Nugent v. Smith*, 1 C. P. D. 423, C. A. As to the implied warranty that the ship is seaworthy, *vide ante*, p. 427.

The common law liability and implied contract of a common carrier.] A common carrier is bound, at common law, to receive and carry all goods reasonably offered to him, and for which the person bringing the goods, is ready and willing, and offers to pay reasonable hire and reward. *Pickford v. Gt. Junction Ry. Co.*, 8 M. & W. 372; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273. He is, in the absence of any special contract, bound to deliver within a time that is reasonable, having regard to all the circumstances of the case; *Taylor v. Gt. N. Ry. Co.*, L. R., 1 C. P. 385; *Donohoe v. L. & N. W. Ry. Co.*, L. R., 1 Cl. 304, Ex.; but he is not responsible for the consequences of delay, arising from causes beyond his own control. *Taylor v. Gt. N. Ry. Co.*, *supra*; and see *Raphael v. Pickford*, 5 M. & Gr. 551. He is bound to carry by the route which he professes to be his route, and must use reasonable diligence in delivering the goods, having reference to the means at his disposal for forwarding them; and he is not justified in delaying the delivery, by adopting a particular mode of forwarding the goods, merely because that is the mode usually adopted. *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., Q. B. 292. But provided he carry by a reasonable and usual route, he is not bound to carry by the shortest route, even though empowered by statute to charge a mileage rate for carriage. *Myers v. L. & S. W. Ry. Co.*, L. R., 5 C. P. 1. If the road is obstructed by snow, he is not bound to use extraordinary means, involving additional expense, for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner, and though, by extra exertions the passengers have been forwarded. *Briddon v. Gt. N. Ry. Co.*, 28 L. J., Ex. 51. He is also an insurer of the goods against all accidents, except the act of God, or the King's enemies; *Forward v. Pittard*, 1 T. R. 27; and whether the loss occurs by accident, robbery, violence, or the negligence of third persons. *Trent Navigation v. Wood*, 4 Doug. 287; 3 Esp. 127. Act of God, means not merely an accidental circumstance, but something overwhelming; *Oakley v. Portsmouth, &c. Steam Packet Co.*, 11 Exch. 623; 25 L. J., Ex. 101, *per* Martin, B.; which, "could not happen by the intervention of man, as storms, lightning, and tempests;" *Forward v. Pittard*, 1 T. R. 33, *per cur.*; and which "could not have been prevented by any amount of foresight and pains and care, reasonably to be expected from" the carrier. *Nugent v. Smith*, 1 C. P. D. 441, 444, *per* James, L.J. See also *Nichols v. Marsland*, L. R., 10 Ex. 255; 2 Ex. D. 1, C. A.; *Nitrophosphate, &c. Manure Co. v. L. & S. Katherine's Dock Co.*, 9 Ch. D. 503.

Common carriers from a place within, to a place without the realm, are subject to the same liabilities, at common law, as a common carrier who carries only within the realm. *Crouch v. L. & N. W. Ry. Co.*, 14 C. B. 255; 23 L. J., C. P. 73.

As to the effect on the carrier's liability, of fraudulent concealment on the part of the sender of the goods, see *post*, pp. 579, 580.

In the case of live stock, a carrier is not liable for an injury caused by the inherent vice of the animal; it is sufficient if he provide for its carriage a truck that is reasonably fit for the purpose. *Blower v. Gt. W. Ry. Co.*, L. R., 7 C. P. 655; explaining *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Exch. 707; 21 L. J., Ex. 263, *per* Parke, B., cited by Erle, J., in *McManus v. Id.*, 4 H. & N. 347; 28 L. J., Ex. 358; *Kendall v. L. & S. W. Ry. Co.*, L. R., 7 Ex. 373; see also *Richardson v. N. E. Ry. Co.*, L. R., 7 C. P. 75; *Gill v. Manchester, &c. Ry. Co.*, L. R., 8 Q. B. 186. Nor is he liable if the injury done is such as no reasonable precaution could have prevented. *Nugent v. Smith*, *ante*, p. 561. So, a carrier is not liable for injury to goods caused by ordinary wear and tear, or chafing during the journey, nor for the natural decay of perishable goods. Story on Bailments, s. 492 *a*, cited *Blower v. Gt. W. Ry. Co.*, L. R., 7 C. P. 663, 664. See further, *post*, p. 579.

A carrier may limit, generally, his business to certain goods, and is then not obliged to carry other kinds of goods; his obligation in this respect depends upon what he publicly professes to do. *Johnson v. Midland Ry. Co.*, 4 Exch. 367; *Orlade v. N. E. Ry. Co.*, 15 C. B. N. S. 680; 26 L. J., C. P. 129.

Any statutory exemption from liability must be pleaded specially. See Rules, 1883, O. xix., r. 15, *ante*, p. 283.

Evidence of the contract.] The contract implied from the delivery and acceptance of the goods, to and by the defendant, in his capacity of carrier, is to charge a reasonable reward for the conveyance, and the jury are the judges of this; *semb. Ashmole v. Wainwright*, 2 Q. B. 837; *Harrison v. L. Brighton & S. C. Ry. Co.*, 2 B. & S. 122; 31 L. J., Q. B. 113; and if the carrier refuses to carry or deliver, except upon payment of an exorbitant charge, the excess, if paid, may be recovered back. S. C. See *ante*, p. 547, *Action for money had and received*. But it is competent, at common law, to make a previous special bargain in each case, for the rate of charge; and under the Carriers Act, s. 6, *post*, p. 567, *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Exch. 707; 21 L. J., Ex. 261.

Where the carrier delivers a ticket or other notice to the person from whom he receives the articles, specifying the terms on which he agrees to carry, and the customer assents (or does not dissent), the terms of the notice will establish a special agreement, and will exclude the common law contract, so far as it is varied by those terms; *Wyld v. Pickford*, 8 M. & W. 443; *Gt. N. Ry. Co. v. Morville*, 21 L. J., Q. B. 319; *Phillips v. Edwards*, 3 H. & N. 813; 28 L. J., Ex. 52; *Zunz v. S. E. Ry. Co.*, L. R., 4 Q. B. 539, 544; see also *Watkins v. Rymill*, 10 Q. B. D. 178, and cases there cited; and such a specific notice is not "a public notice or declaration" within sect. 4 of the Carriers Act, set out *post*, p. 567. *Walker v. York & N. Midland Ry. Co.*, 2 E. & B. 750; 23 L. J., Q. B. 73. If the customer in such a case declines the terms, and wishes to fix the carrier with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods, *per* Parke, B., in *Carr v. Lancashire Ry. Co.*, *supra*; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273. But the mere delivery, to the consignor, of a ticket with conditions printed on the back, of which he has no notice, will not bind him thereby. *Henderson v. Stevenson*, L. R., 2 H. L. Sc. 470. See further

as to the effect of conditions on the back of a ticket, *Harris v. Gt. W. Ry. Co.*, 1 Q. B. D. 515; *Parker v. S. E. Ry. Co.*, 2 C. P. D. 416, C. A., cited *post*, p. 584. Where goods are sent by the defendants, "the company accepting no liability," the stipulation does not exempt the company from liability for a loss arising wholly from their own negligence. *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R., 3 Ex. 9. See further, *ante*, p. 426. But a condition to relieve the carrier "from all liability for loss or damage by delay in transit, or from whatever other cause arising," protects him against the consequences of his servant's negligence, including damage from loss of market. *Brown v. Manchester, &c. Ry. Co.*, 8 Ap. Ca. 703, D. P. And where a passenger, by steamer, takes luggage subject to the further condition, that the ship will not be accountable unless bills of lading had been signed therefor, and the luggage is lost through the negligence of the captain, the plaintiff cannot recover unless the condition has been complied with. *Wilton v. Atlantic Mail, &c. Co.*, 10 C. B., N. S. 453; 30 L. J., C. P. 369. See also *Peninsular & Oriental S. N. Co. v. Shand*, 3 Moo. P. C., N. S. 272. A contract that goods shall be carried "at owner's risk," *vide post*, p. 572, does not exempt the carrier from liability in respect of delay. *Robinson v. Gt. W. Ry. Co.*, H. & R. 97; 35 L. J., C. P. 125; *D'Arc v. L. & N. W. Ry. Co.*, L. R., 9 C. P. 325. The general notice affixed in the offices of carriers, or advertised in newspapers, by which carriers were accustomed to limit, or attempt to limit, their common law liability, are deprived of that effect, so far as regards all common carriers *by land*, by the Carriers Act, s. 4, *post*, p. 567. And it would seem that even if a knowledge of such a public notice, could be brought home to the customer, it would not now protect the carrier. There ought to be proof of a specific agreement between the carrier, or his agent, and the individual tendering the goods. The case of special contracts with railway and canal companies is now provided for by stat. 17 & 18 Vict. c. 31, s. 7, cited *post*, p. 576.

In the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, and in most of the special acts constituting railway companies, there are clauses enabling the company to determine upon "reasonable charges" in respect of the carriage of passengers and goods; and it is generally provided, among other things, by what are known as "Lord Shaftesbury's Clauses," that these charges shall also be "equal," i.e., that all persons and classes of goods shall, under like circumstances, be treated alike as to charges. When the question of reasonableness comes in issue at Nisi Prius, as in an action for refusing to carry, &c., it is one for the jury, and is not a question of law. And where the question of "equality," involves an inquiry into the greater or less risk, incurred by the company, in the conveyance of certain parcels as compared with others, it is for the jury. *Crouch v. Gt. N. Ry. Co.*, 11 Exch. 742; L. R., 25 Ex. 137. Under these acts it has been held, that a railway company cannot treat other carriers, on their rail, on a different footing from other customers, and therefore that they cannot charge such carriers on a higher scale for "packed parcels," that is, parcels enclosing smaller parcels, collected by the consigning carrier, from different persons, and consigned to a single agent for distribution among other persons. *Parker v. Gt. W. Ry. Co.*, 7 M. & Gr. 253; *Crouch v. Gt. N. Ry. Co.*, 9 Exch. 556; 23 L. J., Ex. 148; *Id. v. Id.*, 11 Exch. 742; 25 L. J., Ex. 137; *Piddington v. S. E. Ry. Co.*, 5 C. B., N. S. 111; 27 L. J., C. P. 295; *Sutton v. Gt. W. Ry. Co.*, 3 H. & C. 800; 35 L. J., Ex. 18; L. R., 4 H. L. 226; *Baxendale v. L. & S. W. Ry. Co.*, L. R., 1 Ex. 139. But if the packed parcels are separately directed, so as to give more trouble on delivery, a higher charge is justifiable. *Baxendale v. E. Counties Ry. Co.*, 4 C. B., N. S. 63; 27 L. J., C. P. 137. A railway company charged a through rate, including collection and delivery as well as conveyance, which rate was charged whether the goods were

collected and delivered by the company or not. They charged the plaintiff, who collected and delivered the goods, the full amount, as if they had done so; it was held that he could recover such overcharge in an action for money had and received. *Bazendale v. Gt. W. Ry. Co.*, 14 C. B., N. S. 1; 32 L. J., C. P. 225; 16 C. B., N. S. 137; 33 L. J., C. P. 197, Ex. Ch.; see *Pickford v. Grand Junction Ry. Co.*, 10 M. & W. 399; *Parker v. Gt. W. Ry. Co.*, 7 M. & Gr. 253; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273; *Bazendale v. Gt. W. Ry. Co.*, 5 C. B., N. S. 309; 28 L. J., C. P. 81; *Branley v. S. E. Ry. Co.*, 12 C. B., N. S. 63; 31 L. J., C. P. 286; *Bazendale v. L. & S. W. Ry. Co.*, L. R., 1 Ex. 137; and *Evershed v. L. & N. W. Ry. Co.*, 2 Q. B. D. 254; 3 Q. B. D. 134, C. A.; 3 Ap. Ca. 1029, D. P. The special acts of railway companies generally authorize higher charges for small parcels sent in separate packages, and sometimes provide that large aggregate quantities of goods sent, in several small parcels at the same time, shall be subject to a tonnage charge on the aggregate, and not to the higher rate, as upon small separate packages. See *Parker v. Gt. W. Ry. Co.*, 6 E. & B. 77; 25 L. J., Q. B. 209. But the decisions on all these acts would be out of place in a work of this kind, and are therefore omitted. In order to show a breach by the railway company of the equality clauses, it may be proved that it was well known in the trade and, inferentially, to the company, that mercantile houses were in the habit of despatching packed parcels by the company, and that the company charged less for these parcels than for the packed parcels of the plaintiff, a carrier. *Sutton v. Gt. W. Ry. Co.*, ante, p. 563. Evidence that the agent and traffic manager of the company were present at a reference between another carrier and the defendants, where facts of this sort were proved in their hearing, is also admissible to prove that the defendants knew the usage of the mercantile houses above stated, and knowingly charged the plaintiff a higher rate than others for the carriage of like packed parcels. S. C.

By the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 16, equality is secured to all persons using steamers worked by railway companies; and by sect. 17 railway companies are now bound, on application, to deliver particulars of the charge for the conveyance of goods on their railway, distinguishing how much is for conveyance and how much for loading and other expenses. *Vide post*, p. 574.

When a railway company undertakes to carry goods, from a station on their railway, to a place on another distinct railway, with which it communicates, this is evidence of a contract with them for the whole distance, and the other railway company will be regarded as their agents, and not as contracting with their original bailor. *Muschamp v. Lancaster, &c. Ry. Co.*, 8 M. & W. 421; *Webber v. Gt. W. Ry. Co.*, 3 H. & C. 771; 34 L. J., Ex. 170; 4 H. & C. 582, Ex. Ch. And the same position obtains in the case of passengers. *Vide post*, p. 580. But the first railway Company might, by a special contract, evidenced by the terms of the receipt note or otherwise, restrain their own liability, as carriers, to the limits of their own rail, where they expressly act as agents for the other company; *Fowles v. Gt. W. Ry. Co.*, 7 Exch. 699; 22 L. J., Ex. 76; such a condition embodied in a notice, signed by the consignor, has been held just and reasonable within the meaning of the Railway and Canal Traffic Act, and, therefore, to protect the company (assuming they would be otherwise liable) beyond their own line; *Aldridge v. Gt. W. Ry. Co.*, 15 C. B., N. S. 582; 33 L. J., C. P. 161; and that that act does not apply at all to the carriage of goods over lines not worked by the company. *Zunz v. S. E. Ry. Co.*, L. R., 4 Q. B. 539. Where X. Railway Co. undertook to carry goods over X. and Y. railways, which were damaged on Y. railway, and the contract with X. excluded liability for damage done on Y., it was held that company Y. could not be sued for

it, for there was no contract with Y. *Cozon v. Gt. W. Ry. Co.*, 5 H. & N. 274 ; 29 L. J., Ex. 165. Plaintiff, a passenger, took a ticket from a place on railway X., to a place on railway Y., in the Railway Act for X. the company was made not liable for ordinary passengers' luggage ; on railway Y. there was no such provision ; plaintiff's luggage was lost on railway Y. ; it was held that the Y. company was not liable, the contract being with X. ; and, *semble*, X. company was not liable by reason of their statutable exemption. *Mytton v. Midland Ry. Co.*, 4 H. & N. 615 ; 28 L. J., Ex. 385 ; see *Bristol & Exeter Ry. Co. v. Collins*, 7 H. L. C. 194 ; 29 L. J., Ex. 41. A receipt note by railway A. for goods "*to be sent*" to a place on another railway and there "*delivered*" for one entire sum, is one entire contract with railway A. for the whole distance, and a subsequent company cannot be sued for loss on their railway. S. C. But the effect of such special acceptances, and of the conditions contained in them, when the contract involves an undertaking to cause goods to be conveyed over successive portions of distinct railways forming a continuous line, has been the subject of much difference of opinion among the judges ; and it cannot be taken as yet settled how far conditions or limitations inserted in the receipt note, and therein confined to the carriage of the goods while on the railway of the first company, can be considered as accompanying the goods throughout the whole distance ;—or, whether the company is to be considered as carrying with the ordinary common law liability of carriers when beyond its own limits ;—or, on the conditions and limitations which may be legally in force on each successive railway. The principle to be adduced from the above cases is, that in respect of any cause of action, arising out of the contract of carriage of goods, the contracting party can alone sue the carrier. The owner of the goods however, although not a party to the contract, may sue for a tort, which would have been actionable, apart from the terms of the contract. *Martin v. Gt. Indian Peninsular Ry. Co.*, 3 Ex. 9, 14, *per* Bramwell & Channell, BB. As to the rules applicable to passengers and their luggage, *vide post*, p. 581. Where a railway company A., contract to carry over their own line, and that of another company, B., and enter into such contract, as agents for the company B., the company B. may be sued for an accident on their line. *Gill v. Manchester, &c. Ry. Co.*, L. R., 8 Q. B. 186. Where there has been a general acceptance by company A. to convey goods over another railway B. to C., the bailor may countermand the bailment while in the hands of company B., and, if the goods are lost in consequence of the inattention to the countermand and delivery at C., he may sue A. for the loss. *Scothorn v. S. Staffordshire Ry. Co.*, 8 Exch. 341 ; 22 L. J., Ex. 121. The plaintiff sent goods to a carrier, X., to be carried from A. to D. by three independent carriers, X., Y., Z. ; there being an arrangement between X., Y., Z. that X. should carry from A. to B., Y. from B. to C., and Z. from C. to D. ; X. received the freight for the whole journey, and paid over to Y. and Z. their proportion, after notice that the goods were lost before arriving at B. : held, that X. was not liable, in an action for money had and received, to repay the sums he had so paid over. *Greeves v. W. India, &c. S. Ship Co.*, 20 L. T., N. S. 912, T. T. 1869, Ex. Ch., *ex relatione amici*, *revers.* S. C. in Q. B.

A railway company is liable on its contract, whether the transit be over other railways, or partly by sea, or partly by coach, and whether payment for the whole be before or after delivery to the consignee ; and where a railway company, receives a parcel directed to a place beyond its line, without objection or special contract, there is an implied contract of carriage over the entire distance, although the consignor may have pointed out a route, different from the one usually adopted by the company. *Wilby v. W. Cornwall Ry. Co.*, 2 H. & N. 703 ; 27 L. J., Ex. 181. A condition that the

company will not be responsible for loss or injury in receiving, &c., live stock, if occasioned by the restiveness of the animals, does not exonerate them from injury proximately caused through the negligence of the company. *Gill v. Manchester &c. Ry. Co.*, ante, p. 565.

When the carrier's receipt for the goods is offered in evidence in order to prove the contract, the necessity for an agreement stamp depends on the amount payable for the carriage, and not on the value of the goods; *Lathams v. Rutley, Ry. & M.* 13; if the sum payable amount to 5*l.*, a stamp is now required, *vide ante*, p. 221. The receipt in the case of an inland carrier is exempt from duty as a delivery order, or warrant for goods, *vide ante*, p. 239, but, where the goods are exported or carried coastwise, it becomes a bill of lading, and must be stamped as such, *vide ante*, p. 239. A receipt under the Carriers Act, s. 3, *post*, p. 567, is exempt from duty.

Though a cab driver is not a common carrier, yet if charged on an implied contract to carry a passenger's luggage, "safely and securely," it is no variance; for this shall be taken to mean such obligation to use ordinary care as arises out of the relation between a bailee for him and his bailor, and not the mere extended liability of a common carrier. *Ross v. Hill*, 2 C. B. 877. As to the liability of the proprietor of a metropolitan cab for a loss occasioned by the driver, see *Powles v. Hider*, 6 E. & B. 207; 25 L. J. Q. B. 331; and cases cited *post*, pp. 682, 683. A carrier, even without reward, is liable for gross neglect. *Beauchamp v. Ponoley*, 1 M. & Rob. 38.

Where the action is for refusing to carry, the plaintiff need not aver or prove a strict tender of the fare; it is enough that he was ready to pay. *Pickford v. Gd. Junction Ry. Co.*, 8 M. & W. 372. But where the carrier has limited his liability unless a certain charge be paid, payment or tender of that charge must be proved. *Wyld v. Pickford*, *Id.* 443.

A contract to undertake sea risk for additional freight or otherwise, is, under 30 & 31 Vict. c. 23, s. 12, *ante*, p. 248, a contract for sea insurance, and must comply with the stamp and other provisions of that statute, *vide ante*, p. 247, *et seq.*

[*Carriers Act*, 11 Geo. 4 & 1 Will. 4, c. 68.] This act and the acts next following (pp. 570, 573, 575) govern almost all the cases which now come before the courts, so far as regards the liability of carriers, by land or by canal navigation, and it has therefore been thought superfluous to insert the numerous cases decided before the passing of them upon the efficacy of general notices issued by such carriers in order to restrain liability. For the same reason many of the cases before the Railway and Canal Traffic Act, in which the special contracts of railway companies have been held sufficient to exempt them from the consequences of their own negligence, are omitted. See *Carr v. Lancashire, &c. Ry. Co.*, 7 Exch. 707; *Austin v. Manchester, &c. Ry. Co.*, 10 C. B. 454; 21 L. J., C. P. 179, and other cases.

By stat. 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, "no common carrier by land for hire shall be liable for the loss of or injury to any articles of the descriptions following; (that is to say,)—gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace (not machine-made, 23 & 29 Vict. c. 94), or any of them,—contained in any parcel which shall have been delivered, either

to be carried for hire, or to accompany the person of any passenger in any mail or stage coach or other public conveyance, *when the value of such articles contained in such parcel or package shall exceed 10l.—unless at the time of the delivery thereof* at the office, warehouse, or receiving-house of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the *value and nature* of such articles shall have been declared by the person sending or delivering the same, and the increased charge hereinafter mentioned, or any engagement to pay the same, be accepted by the person receiving such parcel or package.

Sect. 2 authorises the demand of an increased rate of charge for such articles, notified by a notice publicly affixed in the carrier's office, which all persons sending parcels are to be bound by without further proof of the same having come to their knowledge.

Sect. 3 provides "that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the" . . . carrier . . . "shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

By sect. 4, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such public common carriers in respect of any articles or goods to be carried by them; but all such common carriers shall be liable, as at the common law, to answer for the loss of or injury to any articles and goods, in respect whereof, they may not be entitled to the benefit of the act, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding.

By sect. 5, for the purposes of the act, every office, warehouse, or receiving house, used or appointed by such common carrier for receiving parcels, shall be taken to be the receiving house or office of such carrier; and any one or more carriers may be sued without joining their co-proprietors.

By sect. 6, nothing in the act shall be construed to annul or affect any special contract between such common carrier and any other parties for the conveyance of goods and merchandises.

By sect. 7, a person who has insured, as above, may recover back the extra charge as well as the value of the goods lost or damaged.

By sect. 8, nothing in the act shall be deemed to protect any common carrier for hire, from liability to answer for loss or injury, to any goods whatsoever arising from the *felonious acts* of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury, occasioned by his own personal neglect or misconduct.

By sect. 9, common carriers shall be liable to pay only the actual value, as proved, not exceeding the declared value, together with the increased charges paid by the owner.

Where a carrier makes one contract to carry by land and sea, and goods are lost on the land journey, the carrier is within the protection of the act. *Pianciani v. L. & S. W. Ry. Co.*, 18 C. B. 226; *Le Conteur v. Id.*, L. R., 1 Q. B. 54; *Baxendale v. Gt. E. Ry. Co.*, L. R., 4 Q. B. 244, Ex. Ch.

Under sect. 1, articles more for ornament, than use, have been considered

"trinkets," as bracelets, shirt pins, rings, brooches, ornamental purses, and scent bottles; but not a plain metal fusee box. So silk made into articles as watch-guards is within it; silk hose, gold chains for eye-glasses, &c. *Bernstein v. Bazendale*, 6 C. B., N. S. 251; 28 L. J., C. P. 265; and cases cited, *Id.* So is a silk dress made up for wearing. *Flowers v. S. E. Ry. Co.*, 16 L. T., N. S. 329, E. T. 1867, Ex.; overruling *Davey v. Mason*, Car. & M. 45. Hand-painted designs of carpets, are not within the term "paintings," which is to be used in its ordinary sense, as meaning works of art. *Woodward v. L. & N. W. Ry. Co.*, 3 Ex. D. 121. Whether an article is of the description mentioned in this section, is a question of fact for the jury. *S. C.* following *Brunt v. Midland Ry. Co.*, 2 H. & C. 889; 33 L. J., Ex. 187. A blank acceptance for 11*l.*, lost by the carrier, before delivery, and before the drawer's name has been inserted, is not a bill nor a writing of the value of 10*l.* within sect. 1; *Stoessiger v. S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J., Q. B. 293.

The act extends to all the articles enumerated in sect. 1, although not (within the words of the preamble) "an article of great value in small compass." To entitle a party to recover for loss or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article. A looking-glass exceeding the value of 10*l.*, was packed up in a case, and sent to the carrier's office, to be conveyed from London, to a house near Lymington: a notice was fixed up in the office, pursuant to sect. 2: the words "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made, of the nature and value of the article, and no increased rate of carriage paid: the parcel was conveyed from Lymington to its destination in the usual way: it was held that the carrier was not liable for breakage of the glass. *Owen v. Burnett*, 2 Cr. & M. 353; 4 Tyr. 133. A packed waggon sent for carriage by the defendants, containing enumerated articles, is a parcel or package within sect. 1. *Whaite v. Lancashire & Yorkshire Ry. Co.*, L. R., 9 Ex. 67. The expressed opinion of the carrier, as to its real value, will not supersede the necessity of a formal declaration of it. *Boys v. Pink*, 8 C. & P. 361. The packing-case, in which goods mentioned in sect. 1, are contained, is usually considered as accessory to them. *Wyld v. Pickford*, 8 M. & W. 443. So, the frame of a framed picture is accessory to it, and within the act. *Henderson v. L. & S. W. Ry. Co.*, L. R., 5 Ex. 90. But, where the packing-case contains articles, some within the statute and some not, the value of the case, and of the articles not within the statute, may be recovered separately. *Treadwin v. Gt. E. Ry. Co.*, L. R., 3 C. P. 308.

The declaration required by sect. 1 must be given at the time of delivery, whether that be at the carrier's office, or to a carter sent to the customer's house to collect parcels, or on the road, or elsewhere; the carrier may then demand the increased charge as publicly notified in his office under sect. 2, and on payment thereof he is to give the receipt if required, under sect. 3. If no such declaration is made by the bailor on delivery, the carrier is protected by sect. 1 in respect of the specified articles, except in cases of felony referred to in sect. 8. *Hart v. Bazendale*, 6 Exch. 769; 21 L. J., Ex. 123, Ex. Ch. But by sect. 3, if no notice has been affixed under sect. 2, the carrier is not protected, even though no declaration has been made. See *Bazendale v. Hart*, 6 Exch. 769, 778; 20 L. J., Ex. 338, 340, *per cur.* In *Hart v. Bazendale*, *supra*, which is cited in many text books in support of the contrary proposition, the court decided that there had been a sufficient notice under sect. 2, and the exception to the ruling of Pollock, C.B., at the trial being allowed on that hypothesis, the effect on the carrier's liability, of the absence of a notice, did not directly arise in the Exch. Cham. Where the plaintiff sent a valuable picture, by a railway, and declared its nature

and value, at the time of its delivery to the carrier, and the carrier did not demand any increased rate, to which he was entitled under sect. 2, and only the ordinary charge was paid, the carrier was held not to be protected by the statute from his common law liability, for an injury which happened to the picture on its journey. *Behrens v. Gt. N. Ry. Co.*, 7 H. & N. 950, 953; 31 L. J., Ex. 299, 300, Ex. Ch. "There is nothing in the statute which protects the carrier from liability, if, after the value is declared, to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried without making any demand of such increased rate or requiring it to be either paid or promised;" *per cur.*, S. C. The "loss" provided for by sect. 1 means loss, by the carrier or his servant, so that the parcel cannot be delivered; it protects the carrier against liability, for damage caused by delay in delivery, in consequence of a temporary loss. *Millen v. Brasch*, 10 Q. B. D., 142, C. A. But in the case of a temporary loss, the carrier will be liable for detention of the goods, beyond a reasonable time after they have been found. *Hearn v. L. & S. W. Ry. Co.*, 10 Exch. 793; 24 L. J., Ex. 180; an injury done to goods, sent beyond their destination, is within the protection of sect. 1. *Morritt v. N. E. Ry. Co.*, 1 Q. B. D. 302, C. A.

Where an innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by the defendant's mail or any other coach; though he kept no regular booking-office, it was held, that, for the purpose of taking in a parcel, the inn was a receiving-house of the defendants within sect. 5. *Syme v. Chaplin*, 5 Ad. & E. 634.

Since this act, if articles mentioned in sect. 1 are sent without declaration of value and payment of the increased charge, carriers who have complied in the requirements of the act are not liable, though the loss be occasioned by the gross negligence of their servants. *Hinton v. Dibbin*, 2 Q. B. 646; *Morritt v. N. E. Ry. Co.*, *supra*. And it seems that there is no distinction between the negligence of themselves or their servants; but wilful misfeasance would come under a different consideration. See S. CC. By sect. 8, where the loss is by the felony of the carrier's servants, the act does not protect. *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 307; 27 L. J., C. P. 205. The servants of a common carrier, employed by a railway company, to forward goods to their destination, are servants of the company within that section; *Machu v. L. & S. W. Ry. Co.*, 2 Exch. 415; *accord. Doolan v. Midland Ry. Co.*, 2 Ap. Ca. 792, D. P.; but the company are not estopped from denying that the thief is their servant, and may show, that though he represented himself as being one of the servants of the carrier, employed by the company, he was not so in fact. *Way v. Gt. E. Ry. Co.*, 1 Q. B. D. 692. Where, to a defence founded on sect. 1, that the value of the goods had not been declared, the plaintiff replies under sect. 8, alleging a felony by the defendant's servants, the plaintiff must prove facts which show not merely that *somebody* must have stolen them while they were *in transitu*, but also that it is more likely that they were stolen by the defendant's servants than any one else. *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 311; 27 L. J., C. P. 333; *Gt. W. Ry. Co. v. Rimmell*, *post*, p. 570. It is not sufficient to show merely that they had greater opportunity of committing the theft; *M'Queen v. G. W. Ry. Co.*, L. R., 10 Q. B. 569; although it is not necessary to give evidence which would fix any one servant of the company with the felony. *Vaughton v. L. & N. W. Ry. Co.*, L. R., 9 Ex. 93. See also *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468. Where the carrier carries on a special contract, exempting him from liability for loss, unless the goods are declared, and extra charge paid, felony by his servant will not deprive him of this protection, unless there be also gross

negligence; *semble*, *Butt v. Gt. W. Ry. Co.*, 11 C. B. 140; 20 L. J. C. 241. This case is explained in *Gt. W. Ry. Co. v. Rimmell*, 18 C. B. 57; 27 L. J., C. P. 201; and in *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B., N. 307; 27 L. J., C. P. 205, as not, in fact, being a case under the Carriers Act at all; negligence is the material point, when there is a special contract, when the statute is set up as a defence; S. CC.

A specific notice repudiating liability in certain cases, and served on the customer, as to which see further *ante*, pp. 562, 563, is not a public notice or declaration, within sect. 4, and it may, if he assent to it, or does not dissent, amount to a special contract, or be evidence of one for the jury, within sect. 6. *Walker v. York & N. Midland Ry. Co.*, 2 E. & B. 730; 33 L. J., Q. B. 73. But it has been recently said, that sect. 6 applies only to contracts, the provisions of which are inconsistent with the exemption claimed by the carriers under sect. 1. *Baxendale v. Gt. E. Ry. Co.*, L. R., 4 Q. B. 244, Ex. Ch.

Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31.] By this Act very important provisions are made respecting the traffic on railways and canals. They include as well lessees and contractors working railways or canals, as the companies or owners, and all navigations whereon tolls are levied by act of parliament; sect. 1. The Act provides against neglect of any company to afford facilities for traffic, or undue preference being shown by such company, in favour of certain persons or traffic; sect. 2; and gave certain special remedies by application to the Court of C. P. in case of alleged breach of the enactment; sects. 3-5; but nothing therein is to take away any right, remedy, or privilege of any person against such company; sect. 6. The provisions of the act have been extended by the Regulation of Railways Act, 1868, s. 16, *post*, p. 574, and *Id.* 1871, s. 12, *post*, p. 575, to the steam vessels worked by railway companies and the traffic carried on thereby, and to traffic they procure to be carried in ships not belonging to them, subject to a power to limit their liability as to sea and water risks. The Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, ss. 11, *et seq.*, further extends the provisions of the Act; and sect. 6 transfers the jurisdiction of the C. P. above mentioned to the Railway Commissioners appointed under sect. 4.

By 17 & 18 Vict. c. 31, s. 7, every company, &c., shall be liable for loss of or injury done to any horses, cattle, or other animals, or to any articles, goods or things, in receiving, forwarding or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition or declaration, made and given by such company contrary thereto, or in anywise limiting such liability; and every such notice, condition, or declaration is declared to be null and void. Provided that nothing therein shall be construed to prevent such companies from making such conditions with respect to receiving, forwarding and delivering such animals, articles, &c., as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. The section further provides certain limits to damages recoverable for loss or injury to any of such animals (namely, a horse 50*l.*; neat cattle, 15*l.* each; sheep and pigs, 2*l.* each), unless the person sending or delivering the same to the company shall, at the time of delivering, have declared them to be of higher value, in which case the company may charge a reasonable per-centage on the excess of value above the limited sum, to be paid in addition to the ordinary charge, such percentage to be notified in the manner prescribed by the Carriers Act, s. 2 (*ante*, p. 567), and to be binding on the company as therein mentioned. Proof of the value and amount of injury is to lie on the claimant. No special contract between the company and the other parties respecting the receiving,

forwarding, or delivering of any goods, &c., shall be binding on or affect such party, unless it be signed by him or the person delivering the goods for carriage. Nothing in the act is to alter or affect the rights or liabilities of the company under the Carriers Act, with respect to the articles mentioned in that act (*ante*, p. 566).

The language of sect. 7 differs much from that of the Carriers Act. The word "public" is not inserted before the word "notice," but it is now settled that "General notices to limit the liability shall be null and void; but the parties may make special contracts with the companies, provided those contracts are adjudged by the court to be just and reasonable, and provided they be signed by the parties." *Simons v. Gt. W. Ry. Co.*, 18 C. B. 805, 829; 26 L. J., C. P. 25, 32, *per* Jervis, C.J. *Accord. M'Manus v. Lancashire, &c. Ry. Co.*, Ex. Ch., *infra*, and *Peck v. N. Staffordshire Ry. Co.*, D. P., *post*, p. 572. The section only applies to carriage of goods over lines which the company are working themselves, and not to contracts by the company to carry over other lines. *Zunz v. S. E. Ry. Co.*, L. R., 4 Q. B. 539. But, where the company contract to carry over their own as well as other lines, they must prove that the loss did not occur on their line, in order to avail themselves of a condition of non-liability. *Kent v. Midland Ry. Co.*, L. R., 10 Q. B. 1. See also *Flowers v. S. E. Ry. Co.*, 16 L. T., N. S. 329, E. T. 1867, Ex.

In *Simons v. Gt. W. Ry. Co.*, *supra*, the court held that a condition exempting a company from liability for loss, detention, or damage, if goods were improperly packed, was unreasonable. *Accord. Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273, where an action was held to lie for refusing to carry unless the plaintiff signed that condition. But a company may stipulate not to be liable for loss or damage, "however caused," in a contract to carry at a special or mileage rate. *Simons v. Gt. W. Ry. Co.*, *supra*. The act makes the question of reasonableness one of law, and not of fact; *per cur.*, S. C. If the particular condition relied on by the company to protect them in the particular case is a reasonable one, the unreasonableness of other conditions in the contract, not relied on, is not material; *per cur.*, S. C.

A special contract professing to protect a company from damage to horses, "however occasioned," is not reasonable; *M'Manus v. Lancashire & Yorkshire Ry. Co.*, 4 H. & N. 327; 28 L. J., Ex. 353, Ex. Ch.; *M'Cance, v. L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J., Ex. 65; 3 H. & C. 343; 34 L. J., Ex. 39; *Ashendon v. L. Brighton & S. Coast Ry. Co.*, 5 Ex. D. 190. Conditions, annexed by a railway company to their "cattle tickets," that the company should not be liable for damage to cattle from any cause whatever, "it being agreed that the animals are to be carried at the owner's risk, and that the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein; complaint to be made in writing to the company's officer before the waggon leaves the station," are not reasonable; *Gregory v. W. Midland Ry. Co.*, 2 H. & C. 944; 33 L. J., Ex. 155; even though the owner is allowed a free pass for a man, to take care of the cattle. *Rooth v. N. E. Ry. Co.*, L. R., 2 Ex. 173. But, a declaration in such a contract that the horses sent thereunder did not exceed 10*l.* in value, binds the sender. *M'Cance v. L. & N. W. Ry. Co.*, *supra*. A railway company gave the plaintiff a printed notice, that they would only carry marbles, subject to the conditions therein stated, one of which was that they would not be responsible for any loss or injury unless the marbles were declared and insured according to their value. With knowledge of these conditions the plaintiff instructed the company by letter, to forward them "not insured," which they did, and the marbles were injured,—it was held, though there was no wilful default or neglect found, that the company were liable, and that the con-

dition was neither just nor reasonable, for the effect of such a condition would be to exempt the company from responsibility for injury, however caused, whether by their own negligence, or even by fraud or dishonesty on the part of their servants. *Peek v. N. Staffordshire Ry. Co.*, 10 H. L. C. 473 ; 32 L. J., Q. B. 241. The conditions must be embodied in a special contract signed by the party, otherwise they will not bind him. Thus the above letter was held not to constitute a special contract in writing, the words "not insured" being insufficient, either expressly or by reference, to embody the above condition. S. C. Where, however, the defendants have been in the habit of conveying the plaintiff's goods on certain printed conditions exempting the defendants from liability, and known as "owner's risk," a memorandum signed by the plaintiff, "Please receive and forward," &c. ; "owner's risk," is a sufficient contract, and evidence of the terms is admissible. *Lewis v. Gt. W. Ry. Co.*, 3 Q. B. D. 195, C. A. Where an agent who is employed to deliver cattle to be sent by a railway company signs the consignment note, he must be taken to have known the contents and thereby binds his principal. *Kirby v. Gt. W. Ry. Co.*, 18 L. T., N. S. 658, Martin B.

Where a special contract provided that the company should not be liable for damage to horses conveyed, and a horse was injured in consequence of its being left without food all night in a box at the station, their being no one to receive it on its arrival ; Held, that the company was not liable ; and *semble*, the damage being the fault of the sender or the consignee, in not providing for the reception of the horse, the defendants would not be responsible, independently of the special contract. *Wise v. Gt. W. Ry. Co.* 1 H. & N. 63 ; 25 L. J., Ex. 258. A condition exempting the company from liability "in respect of any loss or detention of or injury to cattle" in the receiving, forwarding, or delivery thereof, except in proof that it arose from the wilful misconduct of the company's servants, does not protect the company, from liability for a wrongful detention, at the end of the transit under a mistaken claim for unpaid freight. *Gordon v. Gt. W. Ry. Co.*, 8 Q. B. D. 44. Where cattle were accidentally smothered by the fall of the lid of a van in which they were carried on a railway, and the van was not objected to by the drover, who was allowed a free pass to accompany the cattle, it was held, that a special contract exempting the company from liability for loss or damage from suffocation, or any other cause, was reasonable, and would protect them ; and *semble*, even without such contract, the company would not be liable under the above circumstances. *Pardington v. S. Wales Ry. Co.*, 1 H. & N. 392 ; 26 L. J., Ex. 105. On sending fish the plaintiff signed a condition, that, as to fish, the company should not be responsible under any circumstances for loss of market, or other loss or injury arising from delay, or detention of trains, or from any other cause whatever, other than gross neglect or fraud ; the fish arrived too late for the market they were intended for, but the cause of the delay was not shown ; it was held that the condition was reasonable, and protected the defendants ; *Beal v. S. Devon Ry. Co.*, 5 H. & N. 875 ; 29 L. J., Ex. 441. The decision was affirmed in Ex. Ch., 3 H. & C. 337 ; the court holding the condition reasonable, as it left the company liable in all cases where carriers are liable for gross negligence, that is, for want of reasonable care, skill, and expedition. So, a condition that the company should not as to meat, &c., be liable for loss of market, provided they were delivered within a reasonable time, was held reasonable. *Lord v. Midland Ry. Co.*, L. R., 2 C. P. 339 ; see also *White v. Gt. W. Ry. Co.*, 2 C. B., N. S. 7 ; 26 L. J., C. P. 158. But, a condition that the company should not be answerable for any consequences arising from over-carriage, detention, or delay in the conveying or delivering of cattle, *however caused*, was held unreasonable. *Allday v. Gt. W. Ry. Co.*, 5 B. & S. 903 ; 34 L. J., Q. B. 5.

In determining whether a condition is reasonable, the courts consider whether any reasonable alternative is offered to the customer, as of sending at a legal higher rate, not subject to the condition. In such case even although the condition relieve the company from all liability, there is strong *prima facie* ground for holding it to be reasonable. *Brown v. Manchester &c., Ry. Co.*, 8 Ap. Ca. 703, D. P., cited *ante*, p. 563. See further *Lewis v. Gt. W. Ry. Co.*, 3 Q. B. D. 195, C. A.

A condition as to risk of luggage on a passenger's ticket is within sect. 7. *Cohen v. S. E. Ry. Co.*, 1 Ex. D. 217; 2 Ex. D. 253, C. A., overruling *Stewart v. L. & N. W. Ry. Co.*, 3 H. & C. 135; 33 L. J., Ex. 199. Sect. 7 does not apply if the railway company do not receive the goods in the capacity of carriers, as where luggage was left at the defendants' cloak-room by a person who had been a passenger by the railway. *Van Toll v. S. E. Ry. Co.*, 12 C. B., N. S. 75; 31 L. J., C. P. 241; and other cases cited *post*, pp. 577, 583.

Most of the above cases are cases relating to injury, which have happened after the contract for carriage has been completely made; but the statute goes further. Sect. 7, *ante*, p. 570, in terms, applies to injuries in the receiving, forwarding, or delivering, and protects railway companies, beyond a certain amount, unless the value of the animal is declared. Where injury was done to a horse at a railway station by the negligence of the company, before the declaration of value had been made, or ticket taken, or fare demanded, it was held that this was an injury in the receiving, and the owner could not recover more than 50*l.*, even though it was the usual practice to put horses in their box before declaring their value or paying the fare. *Hodgman v. W. Midland Ry. Co.*, 5 B. & S. 173; 33 L. J., Q. B. 233; Ex. Ch., 6 B. & S. 560; 35 L. J., Q. B. 85.

A railway company cannot repudiate a special contract on the ground that it has not been signed by the consignor: the proviso in sect. 7 only applies to cases, where the company seek to relieve themselves from liability, by reason of there being a special contract. *Bazendale v. Gt. E. Ry. Co.*, L. R., 4 Q. B. 244.

To entitle the company to demand the percentage under sect. 7, the sender must make a declaration of the value with the intention of paying the percentage; but the company is bound to carry at the ordinary rate without increased risk if the sender require it, even though the company have notice of the higher value of the animals. *Robinson v. L. & S. W. Ry. Co.*, 19 C. B., N. S. 51; 34 L. J., C. P. 234. The reasonableness of the percentage is a question for the jury. *Harrison v. L. Brighton & S. C. Ry. Co.*, 2 B. & S. 152, 167; 31 L. J., Q. B. 113, 119, *per* Erle, C. J., in Ex. Ch. The principle is not what profit it may be reasonable for the company to make, but what is reasonable to charge the party charged. See *Canada Southern Ry. Co., v. International Bridge Co.*, 8 Ap. Ca. 723, P. C.

The Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, Part II.] The interpretation clause, sect. 2, is as follows.—

"The term 'railway' means the whole or any portion of a railway or tramway, whether worked by steam or otherwise.

"The term 'company' means a company incorporated either before or after the passing of this act for the purpose of constructing, maintaining, or working a railway in the United Kingdom (either alone or in conjunction with any other purpose); and includes, except when otherwise expressed, any individual or individuals not incorporated, who are owners or lessees of a railway in the United Kingdom, or parties to an agreement for working a railway in the United Kingdom."

"The term 'person' includes a body corporate."

By sect. 14, where a company, by through booking, contracts to carry animals, luggage or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, &c., by sea, from the act of God, the king's enemies, fire, accidents from machinery, boilers and steam, and all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the place where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, &c., be valid as part of the contract between the consignor of such animals, &c., and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word "company" includes the owners, lessees or managers of any canal or other inland navigation.

By sect. 15, railway companies are to exhibit in their booking offices a table of the fares of passengers by the trains included in the time tables of the company, from that station to every place for which passenger tickets are there issued.

By sect. 16, "where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case, tolls shall be at all times charged to all persons equally, and after the same rate, in respect of passengers conveyed in a like vessel, passing between the same places under like circumstances, and no reduction or advance in the tolls shall be made in favour of, or against, any person using the steam vessels, in consequence of his having travelled, or being about to travel, on the whole or any part of the company's railway, or not having travelled or not being about to travel, on any part thereof, or in favour of or against any person using the railway, in consequence of his having used or being about to use, or his not having used or not being about to use, the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway."

"The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable shall extend to the steam vessels and to the traffic carried on thereby."

By sect. 17, "where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on application in writing within one week, after payment of the said charge, made to the secretary of the company, by the person by whom or on whose account the same has been paid, the company shall within fourteen days, render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses, but without particularizing the several items of which the last-mentioned portion of the charge may consist."

By sect. 18, "where two railways are worked by one company, then in the calculation of tolls and charges, for any distances in respect of traffic (whether passengers, animals, goods, carriages, or vehicles), conveyed on

both railways, the distances traversed shall be reckoned continuously on such railways, as if they were one railway."

The equality clauses did not, under the previous act, extend to steamers worked by railway companies. *Branley v. S. E. Ry. Co.*, 12 C. B., N. S. 63; 31 L. J., C. P. 286.

The Regulation of Railways Act, 1871, 34 & 35 Vict. c. 78. By s. 12, where railway companies under contract to carry passengers or goods by sea, procure the same to be carried in a vessel not belonging to them, they are liable for loss or damage to the same extent as though the vessel had belonged to them.

This section extends the provisions of 31 & 32 Vict. c. 119, s. 16, *ante*, p. 574, and therefore of 17 & 18 Vict. c. 31, s. 7, *ante*, p. 570, to the carriage of goods which the company contract to carry, but procure to be carried in ships not belonging to them. *Doolan v. Midland Ry. Co.*, 2 Ap. Ca. 792, D. P.

Who should be plaintiff.] The proper person to sue, as plaintiff, is the person in whom the property was vested, when lost or damaged. Hence, the consignee is usually the proper plaintiff, because delivering of goods to the carrier commonly vests the property in the consignee. *Dunlop v. Lambert*, 6 Cl. & F. 600; *Fragano v. Long*, 4 B. & C. 219; *Daves v. Peck*, 8 T. R. 330. But where there is a special contract, between the consignor and carrier, the consignor may be plaintiff, and the ownership is immaterial. *Dunlop v. Lambert*, *supra*. If the consignment does not change the property, as where goods are sent on approval, the consignor should sue; *Swain v. Shepherd*, 1 M. & Rob. 223; or where the sale is insufficient to bind the vendee under the Stat. of Frauds. *Coats v. Chaplin*, 3 Q. B. 483; *Coombs v. Bristol & Exeter Ry. Co.*, 3 H. & N. 510; 27 L. J., Ex. 401. See cases cited, *ante*, p. 469, *et seq.*, *sub. tit. Action for not accepting goods*. On the other hand, where there is a contract between the consignee and the carrier, so that the former is liable to the latter for the freight, the consignee may sue. *Mead v. S. E. Ry. Co.*, 18 W. R. 735, E. T., 1870, C. P.

Where a single box containing the separate property of A. and B. is delivered to the carrier by a joint agent, A. and B. may join in the action. *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 317; 27 L. J., C. P. 333. A special property is sufficient to support the action. Thus, a laundress may sue a carrier employed by her, who loses the linen returned by her through him. *Freeman v. Birch*, 3 Q. B. 492, n.

Where the contract is made with one railway company, for carriage of goods over the lines of several other companies, *vide ante*, p. 565.

Proof of delivery to defendant.] In an action against the proprietor of a stage-coach for the loss of a parcel, it is sufficient to prove the delivery of the parcel to the driver. *Williams v. Cranston*, 2 Stark. 82. A delivery of goods on the wharf, to some officer accredited for that purpose, as to the mate, binds the shipowner; *Cobban v. Downe*, 5 Esp. 41; *British Columbia, &c. Co. v. Nettleship*, L. R., 3 C. P. 499; or if the master receives goods at the quay or beach, or sends his boat for them, the shipowner's responsibility commences with the receipt; *Abbott on Shipping*, 10th Ed., p. 258, citing *Molloy*, B. 2. c. 2, s. 2; unless it appears that the consignee does not intend to trust the shipowner with the custody, as where he sends his own servant in charge of the goods, who has the exclusive management of them. *E. India Co. v. Pullen*, 1 Str. 690. Where the only proof of delivery was, that the goods were left at an inn-yard where defendant and other carriers put up, it was held to be insufficient. *Selway v. Holloway*, 1 Ld. Raym. 46

So, leaving goods at a wharf piled up among other goods, without communication with any one there, is not a delivery to the wharfinger. *Buckman v. Levi*, 3 Camp. 414. Where the ordinary course of business, at a railway office, was to accept goods, with a special limitation of liability, in writing, and this was known to the plaintiff, who, nevertheless caused his goods to be left with a railway porter at the station, without complying with the regular course, and the porter received them, and they were lost: held, that the company was not liable as on contract, the delivery not being in due course, and the porter not being shown to have, or to have professed to have, power to contract with the plaintiff otherwise than in the ordinary course. *Slim v. Gt. N. Ry. Co.*, 14 C. B. 647; 23 L. J., C. P. 166.

Proof of non-delivery by defendant.] Very slight evidence of non-delivery is sufficient to call upon the defendant to prove delivery. *Griffiths v. Lee*, 1 C. & P. 110; *Hawkes v. Smith*, Car. & M. 72. Whether the carrier is bound to deliver at the residence of the consignee, seems to depend on the circumstances of each particular case. In the absence of any express contract or usage, carriers by land are bound to deliver the goods to, or at the house of, the consignee. See *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389; *Storr v. Crowley*, M'Cl. & Y. 129; *Duff v. Budd*, 3 B. & B. 182, citing *Bodenham v. Bennett*, 4 Price, 31. And, if it be the carrier's course of trade to deliver goods at the consignee's residence, he is clearly bound to do so. *Golden v. Manning*, 2 W. Bl. 916. Where goods are conveyed by sea, it seems to be sufficient for the captain, to deposit them in some place of safety, and give notice to the consignee. See *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 397. And, he is bound to keep them a reasonable time until fetched, and is liable during that time. *Bourne v. Gatliffe*, 3 M. & Gr. 643; 7 M. & Gr. 850, D. P. Although the consignor of goods directs the carrier to deliver them at a certain place, the carrier may deliver them wherever he and the consignee agree; *L. & N. W. Ry. Co. v. Bartlett*, 7 H. & N. 400; 31 L. J., Ex. 92; and in such a case the carrier is not liable to an action by the consignor for not delivering at such place, as the non-delivery was pursuant to the orders of the consignee. S. C.; *Cork Distilleries Co. v. Gt. S. & W. Ry. Co.*, L. R., 7 H. L. 269. But *semble*, where there is a special contract between the carrier and the consignor, he may sue the carrier for breach thereof. S. C. If the carrier deliver the goods at the place directed, in accordance with the ordinary usage, he has fulfilled his obligation, although he has delivered them to a person the sender did not intend. *M'Kean v. M'Ivor*, L. R., 6 Ex. 36. If the consignee refuse to receive the goods, and the carrier puts them into his warehouse, he is not bound as a carrier to give notice to the consignor of the refusal; it is a question for the jury "whether the carrier has done what is reasonable under the circumstances." *Hudson v. Bazendale*, 2 H. & N. 575; 27 L. J., Ex. 93. *Quære*, if the carrier is bound to keep possession of them after refusal. S. C. In an action for non-delivery of a parcel, it appeared that, on refusal of the plaintiff, the consignee, to pay the carriage, the company had sent it back forthwith to a distant terminus where it had been first delivered to them, and took no further step. Held, that they ought to have kept it for the consignee a reasonable time, and that, on tender of the charges the next day, plaintiffs might sue defendants. *Crouch v. Gt. W. Ry. Co.*, 2 H. & N. 491; 26 L. J., Ex. 418; Ex. Ch., 3 H. & N. 183; 27 L. J., Ex. 345. Where the consignee makes default in receiving the goods, the carrier is entitled to recover from him the expenses reasonably incurred in taking care of the goods. *Gt. N. Ry. Co. v. Swaffield*, L. R., 9 Ex. 132.

The liability of a carrier continues till he delivers the goods or ceases to hold them, *quod* carrier. Therefore where goods are destroyed by fire after they are deposited in the defendant's wharf, and before a reasonable time has elapsed for the plaintiff to fetch them, the defendant is liable. *Bourne v. Gatliffe*, *ante*, p. 576. And where the question is, whether the goods have been delivered by the defendant at London, evidence is admissible to show what constitutes a delivery in London, according to the usage of that port; and former dealings between the plaintiff and defendant are evidence of such usage. S. C.; and see *ante*, pp. 429, 430, 575.

Where there has been a delivery by the carrier, actual or constructive, though the goods remain on his premises, he is no longer liable as carrier, but only as warehouseman, or on any special terms of bailment which he may choose to impose on the customer. See *Mitchell v. Lancashire & Yorkshire Ry. Co.*, L. R., 10 Q. B. 256. Thus where cattle sent by railway were kept at the arrival station, by the direction of the owner's servant, until they could be removed according to the police regulations, the company were held not liable as carriers. *Shepherd v. Bristol & Exeter Ry. Co.*, L. R., 3 Ex. 189. So where goods are carried "to be left till called for," and the carrier does not know the consignee's address, and the consignee does not call for the goods within a reasonable time, the carrier becomes an involuntary bailee, and is liable only for negligence. *Chapman v. Gt. W. Ry. Co.*, 5 Q. B. D. 278. So after refusal of the goods at the consignee's address, *Heugh v. L. & N. W. Ry. Co.*, L. R., 5 Ex. 51. As to the liability of a railway company in respect of goods deposited at a cloak-room at its station, *vide post*, p. 584.

The declarations of the coachman respecting the loss of a parcel are evidence against the coach proprietor. *Mayhew v. Nelson*, 6 C. & P. 58. So, where in an action for not delivering a parcel sent by rail to V., the plaintiff, to a plea of the Carriers Act, replied felony of the company's servants: the statements of the station-master at V. to the superintendent of police, with reference to the loss, and to the absconding of the parcel porter at V., are admissible in evidence. *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468. But, the statements of a night inspector at a railway station, as to the detention of goods, which would pass through the station, and there be under the inspector's charge, were held to be inadmissible against the company. *Gt. W. Ry. Co. v. Willis*, 18 C. B., N. S. 748; 34 L. J., C. P. 195.

If the carrier delivers the goods to a wrong person, he is liable in trover. *Stephenson v. Hart*, 4 Bing. 476; *aliter*, if only lost; *Ross v. Johnson*, 5 Burr. 2825.

Damages.] Where goods are sent from A. to B. and are lost, the consignee is entitled to their value at B., as distinguished from the place where they were delivered to the carrier. *Rice v. Bazendale*, 7 H. & N. 96; 30 L. J., Ex. 371. And in such case the measure of damages is, in general, the market value of the goods, at the place and time, at which they ought to have been delivered; and if there is no market, for the sale of such goods at the place, the jury must ascertain their value, by taking their price at the place of manufacture, together with the cost of carriage, and a reasonable sum for importer's profits. *O'Hanlan v. Gt. W. Ry. Co.*, 6 B. & S. 484; 34 L. J., Q. B. 154.

The damages recoverable are either "such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Bazendale*, 9 Exch. 341; 23 L. J., Ex. 179; see also *Cory v. Thames Iron Works Co.*, L. R., 3 Q. B. 181, and *Elbinger Actien-Gesellschaft v. Armstrong*, L. R., 9

Q. B. 473. Plaintiff being under contract to deliver coals at a certain time in a distant colony, engaged defendant to convey them, defendant being aware of the contract: held that, on failure of the defendant, he was liable to the extra expense of conveyance by other means, incurred by plaintiff, as special damage. *Prior v. Wilson*, 8 W. R. 260, H. T. 1860, Q. B. And even where plaintiff was under no contract to deliver, a rise in price of coal at the pit's mouth, between the times when the defendant's ship should have been ready to take the coals on board, and when the plaintiff could obtain another ship to carry them, was held to be *prima facie* recoverable in addition to extra freight; as, by the custom of the colliery trade, the plaintiff was not able to secure a cargo, till he had vessels to carry it. *Featherston v. Wilkinson*, L. R., 8 Ex. 122. Where, owing to the delay of a month, in the delivery of cloth by the defendants, which the plaintiff wanted immediately to make up into caps, the plaintiff lost the season, it was held that he could not recover, as damages, the loss of the profit he would have made by the sale of the caps, but that he could recover the amount of depreciation in the market value of the cloth owing to the lapse of the season. *Wilson v. Lancashire, &c. Ry. Co.*, 9 C. B., N. S. 632; 30 L. J., C. P. 232; see also *Gt. W. Ry. Co. v. Redmayne*, L. R., 1 C. P. 329. So, the plaintiff may recover the difference between the market price of hops, on the day when they ought to have been delivered, and the price when they were available for sale, owing to delay and damage caused by the defendants. *Collard v. S. E. Ry. Co.*, 7 H. & N. 79; 30 L. J., Ex. 393; see also *Gee v. Lancashire, &c. Ry. Co.*, 6 H. & N. 211; 30 L. J., Ex. 11. In an action for not delivering samples in time for exhibition at a show, it was held that damages were recoverable for loss of estimated profits by reason of their not being exhibited, without evidence of the prospect of profits at the particular show. *Simpson v. L. & N. W. Ry. Co.*, 1 Q. B. D. 274.

In order to recover damages for non-sale, owing to delay in carrying, there must have been an actual contract to buy for a price; *Hart v. Bazendale*, 16 L. T., N. S. 390, Martin, B. Loss of a beneficial sub-contract cannot be recovered without notice to the carrier of the special terms thereof; *Horne v. Midland Ry. Co.*, L. R., 7 C. P. 583; Ex. Ch., L. R., 8 C. P. 131; and it seems that a mere notice of such sub-contract, will not be sufficient, unless it be given under such circumstances as to make it a term of the contract that the carrier will, on breach thereof, be liable for such loss. S. C., L. R., 8 C. P. 139, 141, 145; *British Columbia, &c. Sawmill Co. v. Nettleship*, L. R., 3 C. P. 499, 509, *per* Willes, J. So, loss of hire of goods, sent for hire, cannot be recovered unless the carrier had notice that they were sent for that purpose. *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., C. P. 292. The plaintiffs delivered to the defendants machinery intended for the erection of a saw-mill at Vancouver's Island; the defendants knew generally of what the shipment consisted; part was lost, so that the mill could not be erected, and the plaintiffs had to send to England to replace the loss: held, that the measure of damages was the cost of replacement in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment. *British Columbia, &c. Sawmill Co. v. Nettleship*, *supra*. But in the case of the carriage of goods by ship, damages for loss of market are not recoverable, although the delay was occasioned by defects in the ship. *The Parana*, 2 P. D. 118, C. A.

Where, by reason of a refusal to carry, or of non-delivery, or delay by a railway company, a carrier, who uses the railway for his parcels, is injured in his own business as a carrier, such injury is too remote to be considered in damages. *Semb. Crouch v. Gt. N. Ry. Co.*, 11 Exch. 742; 25 L. J., Ex. 137. So the hotel expenses of the plaintiff, a commercial traveller, while

he was waiting for the goods, which the defendants ought to have delivered, were held to be too remote to be recovered. *Woodger v. Gt. W. Ry. Co.*, L. R., 2 C. P. 318. See further, *post*, p. 582. A carrier B. contracted with A., to carry A.'s goods, and B. sent them by an independent carrier C., who injured them in transit, whereby B. was compelled to pay damages in an action brought against him by A. B. gave notice to C. of the claim and action, but C. declined to interfere. It was held that B. could not recover from C. the costs of that action. *Bazendale v. L., Chatham, & Dover Ry. Co.*, L. R., 10 Ex. 35, Ex. Ch. Where bales of rags were sent, for carriage, without notice to the carrier that they were damp, and in consequence only, of their being damp, delay in carriage caused them to heat and become worthless; the carrier was held liable to nominal damages only. *Baldwin v. Id.*, 9 Q. B. D. 582.

The cases on the measure of damages are collected and discussed in the notes to *Vicars v. Wilcocks*, 2 Smith's Lead. Cas., 8th ed., 805.

When the plaintiff has made a false declaration of the value of horses, in order to induce a railway company to carry them on lower terms, and they are injured by the company's negligence, he cannot recover more than the declared value. *McCance v. L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J., Ex. 65; 3 H. & C. 343; 34 L. J., Ex. 39, Ex. Ch. The defendants had in this case admitted liability by payment into court; but *quere* if they were liable at all? See cases collected, *infra*.

Costs.] As to the effect of the County Courts Act, 1867, s. 5, with reference to costs in actions against carriers, *vide ante*, p. 277.

Defence.

By Rules, 1883, O. xix., r. 15, the defendant must plead specially all facts not previously stated on which he relies, and must raise all such grounds of defence as if not pleaded would be likely to take the plaintiff by surprise; and r. 17 provides that the defendant shall not deny generally the allegations in the statement of claim. By r. 20 a bare denial denies the making of the contract in point of fact only, and not its sufficiency in point of law. See the rules cited *ante*, pp. 282, *et seq.* A defence arising under the Carriers Act, s. 1, *ante*, p. 566, must therefore be specially pleaded. *Syms v. Chaplin*, 5 Ad. & E. 634. A carrier may, by his defence, set up the title of a third person who has claimed, and retaken the goods. *Sheridan v. New Quay Co.*, 4 C. B., N. S. 649, 650; 28 L. J., C. P. 58. See *Clough v. L. & N. W. Ry. Co.*, L. R., 7 Ex. 26, Ex. Ch. As to right of master of ship to sell cargo in case of necessity, *vide ante*, p. 429.

Loss by plaintiff's own default.] It is questionable how far, and under what circumstances, it is a defence that a parcel was lost by the default of the plaintiff himself. It has been considered that where the gist of the action is negligence and non-performance of duty, so as to be founded on tort, rather than contract, this may be a defence. See *Webb v. Page*, 6 M. & Gr. 196; *Martin v. Gt. N. Ry. Co.*, 16 C. B. 179; 24 L. J., C. P. 209; and *Burrows v. March Gas Co.*, L. R., 5 Ex. 67; Ex. Ch., L. R., 7 Ex. 96. Goods that are brittle, or liable to injury, must be safely packed by the consignor, or the carrier will not be liable for injury done to them in carriage, if he have used due care. *Hart v. Bazendale*, 16 L. T., N. S. 390, Martin, B. See also *Baldwin v. L., Chatham, & Dover Ry. Co.*, *supra*, and cases cited *ante*, p. 562. If the consignor has fraudulently concealed the value and risk from the carrier, in order to pay a lower rate of freight, he can main-

tain no action for a loss thus occasioned by his own fault. *Gibbon v. Paynton*, 4 Burr. 2298; *Bradley v. Waterhouse*, 3 C. & P. 318; M. & M. 154; *Batson v. Donovan*, 4 B. & A. 21; see *Sleat v. Fagg*, 5 B. & A. 347, per Abbott, C. J., and *McCance v. L. & N. W. Ry. Co.*, cited *ante*, p. 579. So, although the consignor, is not in general bound to volunteer information, as to the nature of the goods, yet, if he intentionally make false answers to the carrier's inquiries, there is fraud which avoids the contract. *Walker v. Jackson*, 10 M. & W. 168, 169, per Parke, B. In cases where this is a defence, the fact should be specially pleaded, unless the particular issue taken, be such as to make the evidence relevant to it.

Letter Carriers.

The postmaster-general is not a common carrier, and he is not liable for the neglect or default of his subordinate officers. *Lane v. Cotton*, 1 Ld. Raym. 646; 1 Salk. 17; *Whitfield v. Le Despencer, Ltd.*, Cowp. 754. But, the postmaster and his servants are each of them liable for their own personal negligence. S. CC.

Where a postmaster detains letters until the payment to him of more than the legal postage, an action for money had and received, for the money so illegally extorted, may be maintained against him; *Smith v. Dennis*, Lofft, 753; *Barnes v. Foley*, 4 Burr. 2149; 5 *Id.* 2711; *Smith v. Pouditch*, Cowp. 182; or, an action on the case for such detention. *Rowning v. Goodchild*, 3 Wils. 443; 2 W. Bl. 906; *Stock v. Harris*, 5 Burr. 2709.

Passenger Carriers.

Carriers of passengers stand on a different footing from carriers of goods. They are not insurers of the person, and are responsible only for want of due care. *Christie v. Griggs*, 2 Camp. 81; 2 Kent. Com. 600; *Readhead v. Midland Ry. Co.*, L. R., 4 Q. B. 379, Ex. Ch. Hence they do not warrant that their carriages are roadworthy, and they are not liable to a passenger for an accident caused by hidden defect in the carriage, which could not be guarded against, in the process of construction, or by subsequent observation. S. C. They are, however, liable for defects in the carriage caused by the negligence of their sub-contractors. See *Francis v. Cockrell*, L. R., 5 Q. B. 184; *Id.* 501, Ex. Ch. As to their liability for an accident, caused by the defects in a carriage of another company, sent for transit over their line, see *Richardson v. Gt. E. Ry. Co.*, 1 C. P. D. 342, C. A. If a railway company choose to contract to carry passengers, not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them, if they had contracted solely to carry over their own line; per Cockburn, C. J., in *Gt. W. Ry. Co. v. Blake*, 7 H. & N. 991; 31 L. J., Ex. 346; *Buzton v. N. E. Ry. Co.*, L. R., 3 Q. B. 549; *Thomas v. Rhymney Ry. Co.*, L. R., 5 Q. B. 226; Ex. Ch., L. R., 6 Q. B. 266. See also *John v. Bacon*, L. R., 5 C. P. 437; and cases cited, *ante*, pp. 564, 565. The issuing by a railway company of a through ticket is evidence of such contract, with the first company. S. CC. But they are not liable for the negligence, or wrongful act of third persons, over whom they have no control. *Wright v. Midland Ry. Co.*, L. R., 8 Ex. 137. A passenger may contract to be carried at his own risk, and the carrier will not then be liable for injury even though caused by negligence; *McCawley v. Furness Ry. Co.*, L. R., 8 Q. B. 57; *Gallin v. L. & N. W. Ry. Co.*, L. R., 10 Q. B. 212; and the condition will exonerate

from liability, any company on whose line the passenger is carried in the course of the journey. *Hall v. N. E. Ry. Co.*, L. R., 10 Q. B. 437. But a passenger who has no notice of a condition, printed on the back of a ticket, taken by him in the usual way, and which has no reference thereto on the face of it, is not bound thereby. *Henderson v. Stevenson*, L. R., 2 H. L. Sc. 470. Where, however, the ticket consisted of a book of paper coupons, with conditions inside, which would have been seen on opening the book, it was held that the whole book was the contract, and the plaintiff could not reject the conditions although he did not know of them. *Burke v. S. E. Ry. Co.*, 5 C. P. D. 1. See also *Watkins v. Rymill*, 10 Q. B. D. 178. See further as to conditions on tickets, cases cited *post*, p. 584.

Where a master takes a ticket for his servant the contract is with the master; and he can sue the carrier for not carrying the servant within a reasonable time. *Jennings v. Gt. N. Ry. Co.*, L. R., 1 Q. B. 7; where, however, the servant takes the ticket for a journey by himself, although on his master's service, the contract is with the servant and the master cannot sue. *Becher v. Gt. E. Ry. Co.*, L. R., 5 Q. B. 241, *vide infra*.

In the case of passengers a duty arises on the part of the carrier to convey them with due care even although the contract of carriage was made with another person. *Austin v. Gt. W. Ry. Co.*, L. R., 2 Q. B. 442; *post*, p. 681. So with respect to the luggage of the passenger. *Marshall v. York & Newcastle Ry. Co.*, 11 C. B. 655; 21 L. J., C. P. 34; *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R., 3 Ex. 9. But no person not a party to the contract other than the passenger himself can sue. *Alton v. Midland Ry. Co.*, 19 C. B., N. S. 213; 34 L. J., C. P. 292; *Becher v. Gt. E. Ry. Co.*, *supra*, unless for a pure tort independent of contract. *Berringer v. Gt. E. Ry. Co.*, 4 C. P. D. 163, *post*, p. 681.

The reason of the difference between the above rules and those relating to the carriage of goods, *vide ante*, p. 565, may be that the bailor of the goods, if they be injured, may sue for their value, as trustee for the owner, whereas unless the passenger could sue, nothing could be recovered for his loss by injury; and passengers' luggage, as an accessory to the passenger, follows the rule which applies to him. The cases relating to personal injury to passengers are collected under *Action for negligence*, *post*, pp. 680 and 697, *et seq.*

The mere taking of a passenger's ticket from A. to B. is evidence of a contract to convey the passenger within a reasonable time from A. to B., but not that the train shall arrive at the time it is expected; *Hurst v. Gt. W. Ry. Co.*, 19 C. B., N. S. 310; 34 L. J., C. P. 264; but the publication of the time bills of the company will amount to a promise that a train will leave A. for B. as advertised, for the conveyance of any person who regularly applies for a ticket and tenders the proper fare, although part of the line of railway belongs to a different company; such publication will also render the company liable for damages occasioned to the plaintiff by the representation, if such train do not in fact run; *Denton v. Gt. N. Ry. Co.*, 5 E. & B. 800; 25 L. J., Q. B. 129; or if there be not room in the train for the plaintiff to whom the company have issued a ticket. *Gt. N. Ry. Co. v. Hawcroft*, 21 L. J., Q. B. 178. Where the time-tables state that "every attention will be paid to insure punctuality so far as it is practicable; but the departure or arrival of the trains will not be guaranteed, nor will the company hold themselves responsible for delay or any consequences arising therefrom," there is a contract to use due attention to keep the times specified as far as reasonably possible, having regard to all the circumstances. *Le Blanche v. L. & N. W. Ry. Co.*, 1 C. P. D. 286, C. A.

If the company justify their breach of a contract to carry on the ground that the passenger has not complied with the conditions of a bye-law, they

must show that they have strictly observed the bye-law on their part. *Jennings v. Gt. N. Ry. Co.*, *ante*, p. 581.

An allegation that an omnibus plies between D. and C. is not supported by evidence which shows that the omnibus, though running from D. to C., yet starts from a point beyond D., and runs to a point beyond C. *Marshall v. Matson*, 15 L. T., N. S. 514, Bramwell, B.

There does not appear to be any obligation, apart from contract, on a passenger carrier to receive passengers, even though there is adequate accommodation. But see 2 Kent, Com. 601, *contra*. The point was not decided in *Benett v. Peninsular, &c. Steam Boat Co.*, 6 C. B. 775. Even if there be such obligation, special circumstances might warrant the rejection of a passenger; as misconduct, refusal to comply with reasonable regulations, overloading, &c. Kent, *supra*.

Passenger ships on voyages beyond Europe are regulated by stat. 18 & 19 Vict. c. 119, which particularly applies to the transport of emigrants beyond seas. This act has been amended by 26 & 27 Vict. c. 51. See also 35 & 36 Vict. c. 73, s. 5, and 37 & 38 Vict. c. 88, s. 54.

Damages.] If, in consequence of the wrongful delay, or erroneous information, of the carrier, a passenger is reasonably obliged to hire another conveyance, or stop a night on the road, the expenses may be recovered; but the jury cannot give general damages for consequent derangement or loss of business, trouble, or inconvenience. *Gt. N. Ry. Co. v. Havcroft*; *Denton v. Gt. N. Ry. Co.*, cited *ante*, p. 581; *Hamlin v. Gt. N. Ry. Co.*, 1 H. & N. 408; 26 L. J., Ex. 20. See *Woodger v. Gt. W. Ry. Co.*, L. R., 2 C. P. 318, *ante*, p. 579. To determine whether the expenditure so incurred by the plaintiff is reasonable, one test is to consider whether a person in the position of the plaintiff would have been likely to incur it, if the delay had been occasioned by his own fault and not by that of the company. *Le Blanche v. L. & N. W. Ry. Co.*, 1 C. P. D. 286, 313, C. A. *per* Mellish, L. J. In this case the cost of a special train hired by the plaintiff was held not recoverable. Where a railway company instead of conveying the plaintiff to the station to which she had booked, turned her out on a wet night, where she could get no accommodation or conveyance, and in consequence she had to walk four miles home, whereby she was made ill, and was hindered in her business, it was held that she was entitled to recover damages for the inconvenience she suffered; but not for the illness, or its consequences, as these were too remote. *Hobbs v. L. & S. W. Ry. Co.*, L. R., 10 Q. B. 111. See, however, as to these damages being too remote, the observations in *McMahon v. Field*, 7 Q. B. D. 591, C. A.

Passengers' luggage.] As respects a passenger's personal luggage, given into the care of the company for carriage, under their control, it seems that a carrier of passengers is liable to the ordinary obligations of common carriers, though there may be no distinct contract for it. 2 Kent, Com. 600; *Richards v. L. Brighton & S. C. Ry. Co.*, *post*, p. 583; *Macrow v. Gt. W. Ry. Co.*, L. R., 6 Q. B. 612, 618, *per cur.*; *Cohen v. S. E. Ry. Co.*, 2 Ex. D. 253, 259, *per* Mellish, L. J. This has, however, been doubted; and in *Stewart v. L. & N. W. Ry. Co.*, 3 H. & C. 135; 33 L. J., Ex. 199, Pollock, C. B., said that a carrier undertakes no responsibility, in respect of the goods of a passenger, beyond that which he undertakes, with respect to the passenger himself. And in respect of luggage which a railway passenger, by his request, takes in the carriage with him, the company are liable for their negligence or wilful misconduct only, and whether the passenger has, or has not, himself been guilty of negligence. *Bergheim v. Gt. E. Ry. Co.*, 3 C. P. D. 221, C. A.; *Talley v. Gt. W. Ry. Co.*, L. R., 6 C. P. 44. But the company are bound, at

the request of the passenger, to take charge of his personal luggage, and to convey it at their own risk. *Munster v. S. E. Ry. Co.*, 4 C. B., N. S. 676; 27 L. J., C. P. 308. Where the company provides servants, to assist passengers to discharge their luggage on arrival, the liability of the company continues, until the servants have done their duty; therefore, where a passenger took articles with him into a railway carriage, and on getting out put them in charge of a railway porter to carry to a cab for him, it was held that the company's duty as carriers continued until they were placed in a cab. *Richards v. L. Brighton & S. C. Ry. Co.*, 7 C. B. 839; *Williams, J., dubitante*. So, where the plaintiff held his bag in his hand, and delivered it to a porter on the platform to take to a cab. *Butcher v. L. & S. W. Ry. Co.*, 16 C. B. 13; 24 L. J., C. P. 137. The company's duty is to have luggage given into their care, for carriage under their control, ready at the usual place of delivery till the passenger can in the exercise of due diligence call and receive it; the passenger's duty is to do so in a reasonable time. *Patscheidner v. Gt. W. Ry. Co.*, 3 Ex. D. 153.

As to the right to sue for loss of luggage of a passenger, when his ticket has been taken by another person, see *Marshall v. York & Newcastle Ry. Co.*; *Martin v. Gt. Indian Peninsular Ry. Co.*, ante, p. 581; where see also the principle to be deduced from these cases.

A carrier of passengers is liable only for the personal luggage of the passenger, and not for merchandise; and where a passenger by a railway, carries merchandise as personal luggage, the company is not liable for the loss, unless it be carried openly, so that its nature is obvious, and no objection has been made by the company's servants. *Gt. N. Ry. Co. v. Shepherd*, 8 Exch. 30; 21 L. J., Ex. 114, 286. In this last case there was no special contract, nor any limit imposed by the company's regulations except as to weight. If a passenger who knows, that by the regulations of the company, he is only entitled to take personal luggage, take merchandise without notice to the company, he cannot afterwards claim to be compensated in respect of its loss; but if the company choose to take merchandise as luggage, it does not lie in their mouth, if an article be lost, to say it is exempt from liability on the ground of the article being merchandise and not luggage. *S. C.*; *Cahill v. L. & N. W. Ry. Co.*, 13 C. B., N. S. 818; 31 L. J., C. P. 271, Ex. Ch.; *Belfast & Ballymena Ry. Co. v. Keys*, 9 H. L. C. 556. The mere fact that a packet looks like merchandise, and is marked glass, is not enough to fix the company with knowledge that it is in fact merchandise, and so to make them responsible; S.C.C. "Personal or ordinary luggage," means that class of articles which are ordinarily or usually carried by passengers as their luggage. *Hudston v. Midland Ry. Co.*, L. R., 4 Q. B. 336; *Macrow v. Gt. W. Ry. Co.*, L. R., 6 Q. B. 612. Sketches and drawings carried by an artist among his personal luggage, are not within the term "ordinary luggage" of a certain weight, usually carried free of charge on railways; *Mytton v. Midland Ry. Co.*, 4 H. & N. 615; 28 L. J., Ex. 385; nor are title deeds and money for use in certain causes, in which the plaintiff was engaged as a solicitor; *Phelps v. L. & N. W. Ry. Co.*, 19 C. B., N. S. 321; 34 L. J., C. P. 259; nor bedding for the use of the plaintiff's household, when he shall have provided himself with a home. *Macrow v. Gt. W. Ry. Co.*, supra. Where a servant takes, as his ordinary luggage, that of his master, the latter cannot sue for loss of it. *Becher v. Gt. E. Ry. Co.*, L. R., 5 Q. B. 241.

The Railway and Canal Traffic Act, 1854, s. 7, and the Regulation of Railways Act, 1868, s. 16, apply to passengers' luggage. *Cohen v. S. E. Ry. Co.*, 1 Ex. D. 217; 2 Ex. D. 253, C.A., overruling *Stewart v. L. & N. W. Ry. Co.*, 3 H. & C. 135; 33 L. J., Ex. 199, vide ante, p. 573. If a passenger take a ticket, for carriage, at a fare below the ordinary rate, on condition that he take no luggage, he must pay for any luggage he takes, although

the private act of the company allows passengers to take a fixed amount. *Rumsey v. N. E. Ry. Co.*, 14 C. B., N. S. 641; 32 L. J., C. P. 244.

The plaintiff, on arriving by a railway at the terminus, deposited her bag, value 20*l.*, in the cloak-room, and paid 2*d.*, and received a ticket for it, on the back of which was printed, "The company will not be responsible for any package exceeding the value of 10*l.*"; it was held that the company were not liable for its loss, though caused by their negligence, as the plaintiff was bound by the condition. *Van Toll v. S. E. Ry. Co.*, 12 C. B., N. S. 75; 31 L. J., C. P. 241; *Harris v. Gt. W. Ry. Co.*, 1 Q. B. D. 515. Where the depositor knows generally that there are conditions on the back of the ticket, but does not know what they are, he is bound by the conditions. S. C.; *Parker v. S. E. Ry. Co.*, 2 C. P. D. 416, C. A. If he knew that there was writing on the ticket but did not know or believe it contained conditions, the question for the jury is whether the defendants have done what was reasonably sufficient to give him notice of the conditions. S. C. But if he did not know there was any writing on the ticket he is not bound by the conditions. S. C.; *Henderson v. Stevenson*, 2 H. L. Sc. 470, *ante*, p. 581. See further, *Burke v. S. E. Ry. Co.*, 5 C. P. D. 1, cited *ante*, p. 581, and *Watkins v. Rymill*, 10 Q. B. D. 178. The condition protects the company from liability not only for loss, but for delay in delivering it, at least where the delay is caused by no wilful act or default of the company, and without their privity or knowledge. *Pepper v. S. E. Ry. Co.*, 17 L. T., N. S. 469, H. T., 1868, Q. B. See further, *ante*, pp. 562, 563, 581.

ACTIONS AGAINST COMMON INNKEEPERS.

This, like the action against carriers, may be treated as founded on tort or on contract. It is generally an action *ex contractu* for some breach of the contract, express or implied, which the innkeeper has entered into, or professes to be ready to enter into, with his guest, in relation to his personal entertainment.

An innkeeper at common law is answerable for the safe keeping of the goods of a guest. *Calye's case*, 8 Rep. 32; 1 Smith's Lead. Ca.; but it is only in respect of the goods of a guest that he is so liable. *Strauss v. County Hotel, &c. Co.*, 12 Q. B. D. 27. Loss of a guest's goods is *prima facie* evidence of liability on the part of the innkeeper. *Dawson v. Chamney*, 5 Q. B. 164; 2 Kent, Com. 592; Story on Bailments, ss. 470-1; *Morgan v. Ravey*, *infra*. He may be exonerated by the negligence of the guest. Thus where money is lost, the ostentatious display of it in a public room at an inn, and leaving it there in an insecure box, is evidence of negligence conducing to the loss. *Armistead v. Wilde*, 17 Q. B. 261; 20 L. J., Q. B. 524; so, where the guest has taken the goods into his own custody, and leaves the door of the room unlocked. *Burgess v. Clements*, 4 M. & S. 306. The omission by the guest to leave valuable articles with the innkeeper, or to fasten his bedroom door at night, is not necessarily such negligence. *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131. The question for a jury will be, whether the loss would or would not have happened if the guest had used the ordinary care that may reasonably be expected from a prudent man. *Cashill v. Wright*, 6 E. & B. 891; *Oppenheim v. White Lion Hotel Co.*, L. R., 8 C. P. 515. It is not enough to ask if the guest had been "grossly negligent." The obligation of the innkeeper extends to the horses and carriages of the guest. *Calye's case*, *supra*; *Jones v. Tyler*, 1 Ad. & E. 522; *Bather v. Day*, 2 H. & C. 14;

32 L. J., Ex. 171. Where the guest, intending to return, had gone leaving his horse, and after the day of his intended return, his horse was injured by being driven in a carriage by the innkeeper's servant, it was held that the innkeeper was liable as such for the injury. *S. C.* But he is not liable for the injury to a horse by a kick from another horse if negligence in him and his servants is disproved. *Darson v. Chamney*, ante, p. 584. As to the care he is bound to exercise towards the goods of his guest of which he retains possession by virtue of his lien, see *Angus v. McLachlan*, 23 Ch. D. 330. The real innkeeper is the person liable, and not a manager in whose name the licences have been taken out. *Dixon v. Birch*, L. R., 8 Ex. 135.

By 26 & 27 Vict. c. 41, s. 1, no innkeeper shall be liable to make good to any guest, any loss or injury to property, brought to the inn (not being a horse, or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than 30*l.*, except in the following cases: (1) Where the property shall have been stolen, lost or injured, through the wilful act, default, or neglect of the innkeeper or any servant in his employ; (2) Where the property shall have been deposited expressly for safe custody with the innkeeper. Provided that, in case of such deposit, the innkeeper may require as a condition to his liability, that the property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same. By sect. 2, if an innkeeper shall refuse to receive for safe custody any property of his guest, or if the guest shall, through any default of the innkeeper, be unable to deposit his property, the innkeeper shall not be entitled to the benefit of the act in respect of such property. By sect. 3, every innkeeper is to cause, at least one copy of sect. 1 of the act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance of his inn, and is to be entitled to the benefit of the act in respect of such property only, as shall be brought to his inn while such copy is so exhibited. By sect. 4, "inn" means any hotel, inn, tavern, publichouse, or other place of refreshment, the keeper of which is by law responsible for the property of his guest; "innkeeper" means the keeper of any such place.

It has been held that "wilful" in sect. 1, *supra*, must be read with "act" only, and not also with "fault or neglect." *Squire v. Wheeler*, 16 L. T., N. S. 93, Byles, J. A material error in the copy exhibited under sect. 3, will exclude the innkeeper from the protection of the statute, *e.g.*, where the copy omits the word "act," in sect. 1 (1). *Spice v. Bacon*, 2 Ex. D. 463, C. A.

An innkeeper by the common law is bound to receive travellers who present themselves as guests, if he has accommodation. *R. v. Irens*, 7 C. & P. 213; *Lane v. Cotton*, 12 Mod. 484, *per* Holt, C.J.; *White's case*, 2 Dyer, 158. See *Fell v. Knight*, 8 M. & W. 276. He is, however, at liberty to set up an inn for the reception of particular classes of people, and is then only bound to do, what he publicly professes to do in this respect. See *per* Parke, B. in *Johnson v. Midland Ry. Co.*, 4 Exch. 371, 373. An innkeeper is not bound to receive persons who are not travellers. *R. v. Luellin*, 12 Mod. 445; *R. v. Rymer*, 2 Q. B. D. 136. Keepers of coffee-houses and taverns (not professing to lodge their guests), are not common innkeepers; *S. C.*; nor are the keepers of lodging or boarding houses, for these do not profess to entertain and lodge all travellers; see cases cited, 2 Kent, Com. 595-6; and *Thompson v. Lacy*, 3 B. & A. 283. If, however, they did so profess, they would be in the same position as a common innkeeper. *S. C.* As to the right of an innkeeper to refuse a guest because he is accompanied by dogs, see *R. v. Rymer*, *supra*.

The lien of innkeepers is treated of hereafter under *Action for conversion of goods*.

DEFENCES IN ACTIONS ON SIMPLE CONTRACTS.

In no part of the system of pleading have the J. Acts, and the rules promulgated under them, produced a greater revolution than with reference to the manner in which defences are to be raised.

All pleas and defences in abatement are abolished; Rules, 1883, O. xxi. r. 20; and all such defences as could formerly have been set up, in actions of contract, by reason of the non-joinder or misjoinder of parties have also been swept away by Rules, 1883, O. xvi., rr. 1, 4, 11, and any objection arising from any non-joinder, will be remedied by the extensive powers of amendment, given for this purpose by r. 11, *vide ante*, p. 86. The principal rules which govern the present system of pleading are contained in O. xix., and will be found *ante*, pp. 282, *et seq.*

The following rules also relate specially to defences:—

Order xxi. r. 1. "In actions for a debt or liquidated demand in money comprised in O. iii. r. 6, a mere denial of the debt shall be inadmissible."

These liquidated demands, see O. iii. r. 6, arise "(A.) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B.), on a bond or contract under seal for payment of a liquidated amount of money; or (C.), on a statute, where the sum sought to be recovered is a fixed sum of money, or, in the nature of a debt, other than a penalty; or (D.), on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E.), on a trust."

It will be seen that O. xxi. r. 1, is to same effect as R. Pl. T. T. 1853, r. 11; which was annulled by Rules, 1883, preamble, and App. O.

R. 2. "In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact; e.g., the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note."

This rule is to the same effect as R. Pl. T. T. 1853, r. 7, *vide supra*.

R. 3. "In actions comprised in O. iii. r. 6, classes (A.) and (B.)" (*vide supra*), "a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed; e.g., in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts, which are alleged to make such receipts by the defendant a receipt to the use of the plaintiff."

This rule is to the same effect as R. Pl. T. T. 1853, r. 6, *vide supra*.

R. 4. "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted."

R. 5. "If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically."

This rule is founded on R. Pl. T. T. 1853, r. 5.

The rules relating to Set-off and Counterclaim will be found *post*, pp. 625, 626

The Rules, 1883, require a defence, that the contract contained a material provision or condition, not mentioned in the statement of claim, or was in the nature of an escrow, *e.g.*, dependent on the approval of a third person before it operated, should be specially pleaded.

A defence denying the contract raises any objection that can be taken under the Stamp Acts. *Vide ante*, p. 209. But O. xix., rr. 15, 20 (*ante*, p. 283) require the defence of the Stat. of Frauds to be pleaded specially. *Clarke v. Callow*, 46 L. J., Q. B. 53, C. A.

Where allegations in the statement of claim have been traversed in the statement of defence in a more general manner than is allowed by O. xix., rr. 17, 19, *ante*, p. 283, the judges in the Chancery Division have, in many instances, treated the case as though there were no defence pleaded, and refused the defendants leave to amend. *Thorp v. Holdsworth*, 3 Ch. D. 637; *Byrd v. Nunn*, 5 Ch. D. 781; 7 Ch. D. 284, C. A.; *Tildesley v. Harper*, *Id.* 403; *Harris v. Gamble*, *Id.* 877. See also *Crowe v. Barnicot*, 6 Ch. D. 753. It must, however, be observed that the practice which the above cases threatened to introduce would, in fact, amount to a return to the worst abuses of the system of special pleading, which was abolished by the C. L. P. Act, 1852. The refusal of Fry, J., in *Tildesley v. Harper*, *supra*, to allow an amendment, was, however, reversed with costs by the C. A., 10 Ch. D. 393, *vide ante*, p. 272.

If the defence is that the contract was with A., and not with the plaintiff, the fact of payment by the defendant to A. is not impertinent, as evidence, to the issue; for it shows that the defence is a *bond fide* one, and not a pretext to avoid payment of the debt. *Gerish v. Chartier*, 1 C. B. 13.

If the defendant is entitled to a verdict on the ground that no contract exists, he must have a verdict against him on inconsistent defences which assume the existence of one; as payment; accord and satisfaction, &c. *Gregon v. Ruck*, 4 Q. B. 737.

The following defences to actions on simple contract are arranged in alphabetical order.

Accord and Satisfaction.

Accord and satisfaction after breach must be specially pleaded, and the evidence required in support of it depends on the allegations in the defence, and the reply to it.

In order to be a good discharge of the cause of action, an accord must be executed, that is, performed by the defendant and accepted by the plaintiff, before it can be pleaded; but the plaintiff may accept a valid executory agreement in satisfaction; *Evans v. Powis*, 1 Exch. 601; *Hall v. Flockton*, 14 Q. B. 380; 16 Q. B. 1039; 20 L. J., Q. B. 208, Ex. Ch.; and it will be a question for the jury whether the agreement, and not the performance of it, was accepted in lieu and satisfaction. S. C. The defendant pleaded the pendency of certain disputes, and an agreement respecting them between the plaintiff and defendant, entered into in satisfaction, &c.; the plaintiff denied the agreement: held, that the pendency of the disputes was admitted on the record. *Hey v. Moorhouse*, 6 N. C. 52. Accord and satisfaction made by a stranger on behalf of the defendant, and adopted by the plaintiff, will be a defence. *Jones v. Broadhurst*, 9 C. B. 193; *Randall v. Moon*, 12 C. B. 261; 21 L. J., C. P. 226.

If one of several joint creditors accept a satisfaction from the debtor, this is a good defence to the action, without proof of any authority from the co-creditors to accept the satisfaction. *Wallace v. Kelsall*, 7 M. & W. 264; *Smith v. Lovell*, 10 C. B. 6; 20 L. J., C. P. 37. So, if satisfaction be

accepted after breach, it is a good defence. *Blake's case*, 6 Rep. 43 b; *Bullen and Leake* on Pleading, 3rd ed., p. 479. The acceptance in *satisfaction*, as well as the agreement to accept, or the *accord*, must be shown. *Bayley v. Homan*, 3 N. C. 920; *Hardman v. Bellhouse*, 9 M. & W. 596. It is not sufficient that the defendant was always ready and willing to carry out his part of the agreement. *Collingbourne v. Mantell*, 5 M. & W. 289; *Wray v. Milestone*, 5 M. & W. 21; *Allies v. Probyn*, 2 C. M. & R. 408.

Where a sum of money has been paid to the plaintiff in satisfaction of unliquidated damages, and a discharge, not under seal, in full signed, the question for the jury is whether the plaintiff's mind went with the terms of the paper he signed, and was he aware of its effect? If not, the discharge would not bind him; *Rideal v. Gt. W. Ry. Co.*, 1 F. & F. 706; *cor. Erle*, C. J., cited by Mellish, L.J., in *Lee v. Lancashire & Yorkshire Ry. Co.*, L. R., 6 Ch. 527, 537, where the cases are collected.

An acceptance of a less sum, in satisfaction of a debt of a larger liquidated amount is, by itself, no good accord; *Cumber v. Wane*, 1 Str. 426; *Beer v. Foakes*, 11 Q. B. D. 221, C. A.; but if there be some additional benefit or legal possibility of benefit to the creditor thrown in, it may be a discharge; see notes to *Cumber v. Wane*, in 1 Smith's L. C. Thus the acceptance of a negotiable security for a less amount, e.g., a cheque payable on demand, will be a good accord and satisfaction. *Goddard v. O'Brien*, 9 Q. B. D. 37. And on this ground, compositions with creditors, accepted by them, or by several of them under an agreement, are pleadable by way of accord; for in cases of doubtful solvency, the agreement of a creditor to give up a part in consideration that others will do so, is valid as against him, and will bind, although all the creditors have not consented. *Norman v. Thompson*, 4 Exch. 755. But if the agreement is signed only as an escrow, and on the understanding that certain others are to sign it, it is no accord unless the others also agree. *Boyd v. Hind*, 1 H. & N. 938; 26 L. J., Ex. 164, Ex. Ch., where *Norman v. Thompson*, *supra*, is corrected and explained. Where the demand is not liquidated, as where it is claimed on a *quantum meruit*, acceptance of a less sum in satisfaction is an answer. *Cooper v. Parker*, 15 C. B. 822; 24 L. J., C. P. 68.

An oral agreement to accept something as a satisfaction, followed by performance and acceptance, is a good defence by way of accord and satisfaction, notwithstanding that the substituted agreement is not in writing, and could not, therefore, have been enforced by reason of the Stat. of Frauds, s. 4. *Lavery v. Turley*, 6 H. & N. 239; 30 L. J., Ex. 49. But the mere acceptance of an invalid agreement in satisfaction would not be a defence. *Case v. Barber*, T. Raym. 450; *Noble v. Ward*, L. R., 2 Ex. 135, Ex. Ch., *ante*, p. 28.

As to a composition entered into by debtor with his creditors, under the Bankruptcy Act, 1883, *vide post*, Part III., *sub tit.*, *Action against debtor who has made a composition with his creditors*.

An agreement to refer to arbitration is not an accord and satisfaction, nor will it oust the jurisdiction of the court, except where the reference is made by the contract itself, a condition precedent to the right of action. *Scott v. Avery*, 5 H. L. C. 811; 6 H. & N. 239; 25 L. J., Ex. 308; *Elliott v. R. Exch. Assur. Co.*, L. R., 2 Ex. 237; *Edwards v. Aberayron, &c. Insur. Soc.*, 1 Q. B. D. 563, Ex. Ch.; *Collins v. Locke*, 4 Ap. Ca. 674, P. C.; and *Dawson v. Fitzgerald*, and *Babbage v. Coulburn*, cited *ante*, p. 315.

Alteration.

This defence was formerly raised under a denial of the contract, where the instrument was declared on in its altered form *Waugh v. Bussell* 5 Taunt.

707; *Hirschman v. Budd*, L. R., 8 Ex. 171; but where it was declared on in its unaltered form, or the altered part did not appear in the declaration, it was necessary specially to plead the alteration. *Hemming v. Trenery*, 9 Ad. & E. 926. In either case the defence must now be specially pleaded. Rules, 1863, O. xix., r. 15, *ante*, p. 283.

The leading case, *Pigot's case*, *infra*, on this defence, was decided on a deed, and so also were some other of the cases cited below, for the law is the same in the case of a deed and of a simple contract; *Davidson v. Cooper*, *infra*; and both kinds of contracts are therefore here considered together.

In *Pigot's case*, 11 Rep. 26 b, it was held (1) that an immaterial alteration by a stranger does not avoid a deed; but (2), if made by a party interested, the alteration will avoid it as against him, whether material or not; and (3) a material alteration by a stranger avoids it. Thus a guarantee was held to be avoided by alteration while in the hands of the plaintiff by attaching seals, so as apparently to make it a deed, without the defendant's knowledge or assent, although the plaintiff sued on it as a simple contract only; *Davidson v. Cooper*, 13 M. & W. 343, Ex. Ch.; and it will make no difference, that the rights of the parties, actually in dispute, are not thereby affected. *Mollett v. Wackerbarth*, 5 C. B. 181. But, an alteration, even though made by the plaintiff, which has no effect on the liability of either party, as stated in the contract, will not vitiate the instrument; *Aldous v. Cornwell*, L. R., 3 Q. B. 573, dissenting from the second resolution in *Pigot's case*, *supra*; unless it be proved, that the part altered, is material for the purposes for which the instrument was created, in which case the instrument will be avoided. *Suffell v. Bank of England*, 9 Q. B. D. 555, C. A., cited *ante*, p. 361. Oblige sued obligor on a bond conditioned for performance of covenants in a deed of sale to the defendant, of certain trees which defendant was to cut down before August, 1684. Plaintiff afterwards altered the deed in his possession by erasing 1684, and writing 1685: held no answer; for the erasure was in a place not material, and to the advantage of the defendant. *Darcy v. Sharpe*, 1 Leon. 282. In *Adsetts v. Hives*, 33 Beav. 52, it was held that a mortgage deed was not made void, by the fact that the date of the day of payment in the proviso for redemption, and the names of the tenants in the parcels, had been filled in by the mortgagee after the execution of the deed. See also *Andrews v. Lawrence*, 19 C. B., N. S. 768, Ex. Ch. It has also been denied that a material alteration by a stranger will avoid an instrument; see 2 Sugd. Powers, 193, citing *Henfree v. Bromley*, 6 East, 310; and *Alderson, B.*, in *Hutchins v. Scott*, 2 M. & W. 814. This would probably depend on whether or no the plaintiff were the person responsible for the safe custody of the instrument. If he were so, then the alteration by a stranger would vitiate the instrument, though it was made without the knowledge of the plaintiff. *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153. See also *Bank of Hindostan v. Smith*, 36 L. J., C. P. 241. If, however, the alteration were made by a stranger at a time when the plaintiff was not responsible for its safe custody, it has never been held that it could be relied on as a defence.

As to the degree of diligence to be exercised by the person having the instrument in his custody there may be some doubt. It would seem from *Shep. Touch.* 69, *Argoll v. Cheney*, Palm. 402, and *Bolton v. Carlisle*, Bp. of, 2 H. Bl. 259, that he is not absolutely in the position of an insurer, and may show that the alterations arose from accident; but in *Croockewit v. Fletcher*, *supra*, Martin, B., makes use of language almost strong enough to make him so. The cancellation of the acceptance on a bill of exchange can be shown to have been done by mistake. *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Novelli v. Rossi*, 2 B. & Ad. 757.

See further as to the effect of alteration, notes to *Master v. Miller*, 1 Smith's L. Cases. The alleged alterations cannot be proved by the declarations of a deceased attesting witness. *Stobart v. Dryden*, 1 M. & W. 615. Where a deed appears to have erasures and interlineations, the presumption is that they were made before execution. *Doe d. Tatum v. Catmore*, 16 Q. B. 745; 20 L. J., Q. B. 364. The rule is different in wills, *vide ante*, p. 135.

If both parties agree to an alteration, then, unless it be made simply for the purpose of correcting an error, the old contract is rescinded, and a new one substituted. The new agreement will in general require a fresh stamp, and if it is one that cannot be stamped after its execution, it cannot be used in evidence. *Vide Stamps, ante*, pp. 230, 231, 249, 250.

See cases on the effect of alteration as to bills and notes, p. 360, *et seq.*: as to bought and sold notes, pp. 480, 481. A material alteration does not avoid the instrument altogether, and where the plaintiff's claim arises on an instrument which the defendant has altered, the plaintiff must nevertheless sue on the instrument. *Pattinson v. Luckley*, L. R., 10 Ex. 330.

Bankruptcy.

See *post*, Part III., *sub tit.*, *Actions by and against Bankrupts.*

Counterclaim.

See *Set-off and Counterclaim, post*, p. 625, *et seq.*

Coverture.

See *post*, Part III., *sub tit.*, *Actions by and against married women.*

Fraud.

The proof of fraud in the party seeking to enforce a contract is a good defence; but it must be specially pleaded. Rules, 1883, O. xix., rr. 6, 15, *ante*, p. 283. And the allegation of fraud must be specific. *Wallingford v. Mutual Society*, 5 Ap. Ca. 685, 697, *per* Ld. Selborne, C. As the law is the same whether the contract is under seal or not, the cases in reference to these two kinds of contract are for convenience here collected together. The fraud must be some concealment or deception, practised by the plaintiff with respect to the very transaction in question; the illegality of the transaction, by reason of usury or other causes, is not sufficient. *Green v. Gosden*, 3 M. & Gr. 446. Where a fraudulent representation constitutes the alleged fraud, it must be on a matter which, in a case of simple contract, was substantially the consideration for the agreement; *per* Erle, J., in *Mallalieu v. Hodgson*, 16 Q. B. 712; 20 L. J., Q. B. 339; *Panama, &c. Mail Co. v. Kennedy*, L. R., 2 Q. B. 580. But a false statement, to the defendant, of the state of accounts between the plaintiff and his debtor, will prove the allegation of fraud, in an action against the defendant as surety for the debtor; *Stone v. Compton*, 5 N. C. 142; but see *Mason v. Ditchbourne*, 1 M. & Rob. 460; 2 C. M. & R. 720, n.; *D'Aranda v. Houston*, 6 C. & P. 511; and *Way v. Hearn*, 13 C. B.,

N. S. 202; 32 L. J., C. P. 34; see further, *ante*, p. 434. Where a surety, being sued on his bond, pleads that it was procured by the fraud and collusion of the plaintiff and the principal, it is not enough to show fraud by the principal, unless the plaintiff was a party to it. *Spencer v. Handley*, 4 M. & Gr. 414. Where the owner of a house sued the defendant for not taking the house according to agreement, it was held (Ld. Abinger, C.B., *dissentiente*), that the plea of fraud was not supported by proof, that the plaintiff's agent had denied the existence of a nuisance, of which he, the agent, was ignorant, but which the plaintiff himself knew of; for though this was a misstatement, it was no fraud. *Cornfoot v. Foulke*, 6 M. & W. 358. But, generally, the fraud of the agent, in the course of his principal's business, is the fraud of the principal; *per* Parke, B., *Murray v. Mann*, 2 Exch. 538; *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259, Ex. Ch.; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; *Swire v. Francis*, 3 Ap. Ca. 106, P. C. See also *W. Bank of Scotland v. Addie*, L. R., 1 H. L. Sc. 145, and *Central Ry. Co. of Venezuela v. Kisch*, L. R., 2 H. L. 99. Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud. *Panama, &c. Telegraph Co. v. India Rubber, &c. Co.*, L. R., 10 Ch. 515. It seems that a fraudulent misrepresentation as to the effect of a deed, may be relied on as a defence to an action on the deed. *Hirschfeld v. L. Brighton & S. C. Ry. Co.*, 2 Q. B. D. 1.

Fraud in this defence means moral fraud, and not merely an innocent misrepresentation. *Moens v. Heyworth*, 10 M. & W. 147 (*dissentiente*, Ld. Abinger); *Panama, &c. Mail Co. v. Kennedy*, *ante*, p. 590. But it should be observed, that where a contract is based on a statement made by the plaintiff, innocently, but which is in fact untrue, specific performance will not be ordered; *New Brunswick & Canada Ry. Co. v. Muggeridge*, 4 Drew. 686; 30 L. J., Ch. 242; and the defendant is entitled to have the contract set aside. *Redgrave v. Hurd*, 20 Ch. D. 1, C. A. See further cases cited *ante*, p. 297, *et seq.* If the plaintiff has fraudulently represented a fact to be true of which he knows nothing, and which is untrue, it will be a defence. *Evans v. Edmonds*, 13 C. B. 777; 22 L. J., C. P. 211; S. C. *per* Maule, J.; *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204, Ex. Ch. See also *Mostyn v. W. Mostyn Coal & Iron Co.*, 1 C. P. D. 145. See further generally, *post*, *Action for Deceit*. In an action by vendee of a term against vendor for not assigning, it is a defence that the defendants' term was not assignable except by consent of the lessor, who was willing to accept a respectable assignee, and that defendant was induced to make the agreement by the false and fraudulent representation of the plaintiff that one J. M., for whose benefit the purchase was made, was a respectable person, whereas he was not respectable. *Canham v. Barry*, 15 C. B. 597; 24 L. J., C. P. 100.

The fraud may consist, in permitting a party to labour under error. Thus, where the defendant erroneously supposed that a picture had been in the possession of an eminent collector, and purchased it from the agent of the plaintiff, who was aware of the defendant's error, but did not undeceive him, Ld. Ellenborough held that the sale was void, the price being probably enhanced by the error. *Hill v. Gray*, 1 Stark. 434. So, where a vendor knowingly permits the vendee to buy under a false representation by a stranger. *Pilmore v. Hood*, 5 N. C. 97. But, mere concealment by the plaintiff of a defect in a chattel, will not avoid the contract, where he is under no obligation to divulge it. *Smith v. Hughes*, L. R., 6 Q. B. 597.

Where goods are falsely described as "the property of a gentleman deceased," or "to be sold by executors," it is fraud, for such property is likely to be sold without reserve; *per* Ld. Mansfield; *Bexwell v. Christie*, Cowp.

395. So where, at a sale by auction, the owner of the goods employs puffers to bid for him, and the buyer has no notice of such employment, it is a fraud, and the seller cannot recover the price. *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, M. & M. 126. The employment of a single puffer when the sale is to be to the highest bidder, is evidence of fraud. *Green v. Baverstock*, 14 C. B., N. S. 204; 32 L. J., C. P. 181. Now see 30 & 31 Vict. c. 48, ss. 4, 5, 6, *ante*, p. 299.

If the maker of a chattel make it with such a defect as to render it worthless, but the defect is patent, and the persons for whom it is made have an opportunity of inspecting it before it is delivered, the maker is not guilty of a fraud if he do not point out the defect. *Horsfall v. Thomas*, 1 H. & C. 90; 31 L. J., Ex. 322. See, however, observations on this case in *Smith v. Hughes*, L. R., 6 Q. B. 605, *per* Cockburn, C.J. Fraud will not avoid a contract whereby an estate in land has passed to the defendant, for the defendant must have disaffirmed the contract, in order to avail himself of the defence (see *Daves v. Harness*, L. R., 10 C. P. 166), and he cannot by such disaffirmance re-vest the estate in the plaintiff. See *Feret v. Hill*, 15 C. B. 207; 23 L. J., C. P. 185.

A bribe given to an agent to induce him to enter into a contract on behalf of his principal, will render the contract so entered into voidable at the option of the principal. *Smith v. Sorby*, 3 Q. B. D. 552, n. See also *Harrington v. Victoria Graving Dock Co., Id.*, 549, cited *ante*, p. 529.

See further *post*, *sub tit.* *Action for deceit and misrepresentation.*

See as to concealment in the case of insurance, *ante*, p. 404, *et seq.*; in the case of a guarantee, p. 434. And see as to frauds by vendors, p. 297, *et seq.*

As to frauds by companies or their directors, whereby persons have been induced to take shares, being a defence to an action for calls, see *post*, Part III., *Actions by and against Companies.*

Frauds, Statute of

The Rules, 1883, O. xix., r. 20, *ante*, p. 283, now require that the insufficiency of any contract by reason of the Stat. of Frauds, should be pleaded specially. *Clarke v. Callow*, 46 L. J., Q. B. 53, C. A. As to when such defence is admissible, *vide ante*, p. 286, *et seq.*, and 468, *et seq.*

Illegality.

Where a contract is illegal or immoral, it cannot be enforced: but such defence must be specially pleaded. *Potts v. Sparrow*, 1 N. C. 594. So, a defence that the contract was a wagering one, and void by 8 & 9 Vict. c. 109, s. 18, *ante*, p. 550, must be pleaded specially. *Varney v. Hickman*, 5 C. B. 271. And see Rules, 1883, O. xix., r. 15, *ante*, p. 283.

The maxim, "*In pari delicto potior est conditio defendentis*," is important to be observed when the defence or reply raises a question of illegality. The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether plaintiff could make out his case, otherwise than through the medium and by the aid of, the illegal transaction, to which he was himself a party. *Taylor v. Chester*, L. R., 4 Q. B. 309, 314.

Some cases of illegality have been already noticed under the head of

Action for money had and received, ante, pp. 550, 551. The facts must be stated specially on the record, and the issues joined sufficiently point out the required evidence. Rules, 1883, O. xix., r. 15, *ante*, p. 283.

In an action for work and labour, the illegality of the transaction will be a defence. A party will not be permitted to recover either for work and labour done, or materials provided, where the whole combined forms one entire subject-matter, made in violation of the provisions of an act of parliament. *Bensley v. Bignold*, 5 B. & A. 335. Thus a printer, who made a false affidavit that he was sole proprietor of a paper, could not sue the real proprietors for the printing, or for any matter connected with its circulation. *Stephens v. Robinson*, 2 C. & J., 209; 38 Geo. 3, c. 78, s. 2. And the proprietor of a newspaper could not, before the filing of the affidavit, directed by the statute, recover upon a contract, for the printing of the paper. *Houston v. Mills*, 1 M. & Rob. 325. So, the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him. *Poppett v. Stockdale*, Ry. & M. 337; and see *Coates v. Hatton*, 3 Stark. 61, and *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237, *ante*, p. 521. A promise to indemnify the plaintiff, in consideration of the plaintiff having published a libel, and defended an action brought against him for that libel, at the defendant's request, is void. *Shackell v. Rosier*, 2 N. C. 634. A contract which amounts to maintenance is illegal and cannot be enforced. S. C.; see *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, and cases there cited. A promise by a director of a railway company, A., that the company would indemnify the promoters of another railway company if they failed in obtaining a bill in parliament, is illegal, the company A. having no power by its act so to apply their funds, and no action lies on such promise. *Macgregor v. Deal & Dover Ry. Co.*, 18 Q. B. 618; 22 L. J., Q. B. 69, Ex. Ch. But, an agreement by a railway company with a landowner to pay him a sum of money on the passing of a bill for extending the powers of the company, if he withdrew his opposition to it, is legal. *Taylor v. Chichester & Midhurst Ry. Co.*, L. R., 4 H. L. 628. A contract with a company formed under the Company's Act, 1862, which is *ultra vires*, is absolutely void. *Riche v. Ashbury Ry. Carriage, &c., Co.*, L. R., 7 H. L. 653. A company of more than 20 members, formed after Nov. 14, 1862, having for its object the acquisition of gain by the company or its members, is illegal, unless registered under the Companies Act, 1862, or unless formed under some other statute or letters patent, or it be a mining company under the jurisdiction of the Stannaries; see sect. 4; and no action will lie in respect of services, rendered in forming or carrying out, the objects of such company if unregistered. *In re S. Wales Atlantic Steamship Co.*, 2 Ch. D. 763, C. A. And a promissory note given to such a company, as security for a loan made by them, in the course of carrying on their business, is given for illegal consideration. *Shaw v. Benson*, 11 Q. B. D. 563, C. A. A mutual marine insurance company, of which persons become members by effecting a mutual policy of insurance, is within this section: *In re Padstow &c. Assur. Assoc.* 20 Ch. D. 137, C. A. So a mutual loan society. *Shaw v. Benson, supra*. See further hereon *Smith v. Anderson*, 15 Ch. D. 247, C. A. An unregistered association constituted before Nov. 1st, 1862, in which there was a continuous change of members, was held not to be formed on each such change, within sect. 4. *Shaw v. Simmons*, 12 Q. B. D. 117. A person who has expended money for the purposes of an unlicensed theatre cannot recover against another at whose request he expended the money, and who participated in the profits. *De Begnis v. Armistead*, 10 Bing. 107.

Money paid by the plaintiff as the price of a patent right, which he knew did not exist, but bought for the purpose of reselling to a company to be formed by him, cannot be recovered. *Begbis v. Phosphate Sewage Co.*, L. R.,

10 Q. B. 491; 1 Q. B. D. 679, C. A. So, money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by his principal, if the principal was at the time aware of the illegal disbursements, or assented to them. *Bayntun v. Cattle*, 1 M. & Rob. 265. Payments made by an election agent or sub-agent, other than the expense agent of a parliamentary candidate A., cannot be recovered from A., such payments being illegal under Stat. 26 & 27 Vict. c. 29, s. 2. *In re Parker*, 21 Ch. D. 408, C. A. A London broker cannot maintain an action for commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 68, (c. 16, Ruff.); *Cope v. Rowlands*, 2 M. & W. 149; nor for sale of shares in a company, British or foreign; *Smith v. Lindo*, 4 C. B., N. S. 395; 5 C. B., N. S. 587; 27 L. J., C. P. 335, Ex. Ch. But, he may recover money paid by him to the seller on account of his principal, for which the broker is, by usage, liable as a principal; *Id.* Money lent for the express purpose of playing at an illegal game, such as hazard; *M'Kinnell v. Robinson*, 3 M. & W. 434; or, for illegally settling stock-jobbing transactions; *Cannan v. Bryce*, 3 B. & A. 179; cannot be recovered back; see, however, *Pearce v. Brooks*, L. R., 1 Ex. 213, 219, *per* Martin, B.; and *Bagot v. Arnott*, 1 R., 1 C. L. 1, C. P. But money lent to enable the borrower to pay a bet, already lost, is not lent on an illegal consideration within the Stat. 5 & 6 Will. 4, c. 41. *Ex pte. Pyke*, 8 Ch. D. 754, C. A. Money paid at the request of the defendant in fulfilment of a wagering contract may be recovered. *Rosewarne v. Billing*, 15 C. B., N. S. 316; 33 L. J., C. P. 55; *Read v. Anderson*, 10 Q. B. D. 100, cited *ante*, p. 530. A broker or agent cannot sue for commission in respect of a sale mentioned in an instrument made by him, and not duly stamped as required by the Stamp Act, 1870, s. 69, *ante*, p. 234; nor can an insurance broker recover brokerage or premiums, in respect of an unstamped policy, *ante*, p. 248. As to wagers, see now 8 & 9 Vict. c. 109, s. 18, *vide ante*, p. 550, and with reference to sales of stock, *vide ante*, p. 518. As to the validity of a bond given for racing debts, see *Bubb v. Yelverton*, L. R., 9 Ex. 471.

It is an answer to an action for refusing to allow the plaintiff to use rooms pursuant to agreement that he intended to use them for the delivery of blasphemous lectures. *Cowan v. Milbourn*, L. R., 2 Ex. 230. The defendant is entitled to justify his refusal on this ground, although, at the time of the breach, he assigned a different reason to the plaintiff. S. C.

No action lies for the value of goods knowingly sold for illegal purposes—as brewers' drugs; *Langton v. Hughes*, 1 M. & S. 593; or bricks under statutable size; *Law v. Hodson*, 11 East, 300. See also *Gaslight & Coke Co. v. Turner*, 5 N. C. 666; 6 N. C. 324, Ex. Ch. A collateral security given for payment of the purchase-money of land, knowingly sold for the purpose of re-sale by lottery, is illegal; *Fisher v. Bridges*, 3 E. & B. 642; 22 L. J., Q. B. 270; and this though the security be by deed: *Id.*

Where the party seeking to enforce the contract has been guilty of contravening a law made for the purposes of the revenue only, it has been held that this is not such an illegality as will prevent him from recovering at law on the contract; as where several partners sued the defendant for the price of spirituous liquors sold, it was held that the omission of the name of one of them in the licence to carry on the business of distillers was no answer. *Brown v. Duncan*, 10 B. & C. 93, and cases there cited. The question is, whether the legislature has either expressly or by implication prohibited the contract? If not, a breach of the law regulating the vendor's trade may expose the firm to penalties, but does not necessarily avoid a contract of sale by him. *Smith v. Mawhood*, 14 M. & W. 452; *Bailey v. Harris*, 12 Q. B. 905. Non-delivery of a ticket to the purchaser of coals in

London disables the vendor from recovering the price. *Cundell v. Dawson*, 4 C. B. 376.

An agreement not to prosecute for a criminal offence is illegal; *Keir v. Leeman*, 9 Q. B. 371 Ex. Ch.; *Williams v. Bailey*, L. R., 1 H. L. 200; but unless given in pursuance of such agreement, securities given to a creditor, by a debtor whose debt has been contracted under circumstances that might have rendered him liable to a prosecution, may be enforced. *Flower v. Sadler*, 10 Q. B. D. 572, C. A.

Where a contract is made for the performance of an illegal act, knowledge that the act is illegal is not material, and the contract is void; but where the contract is capable of being legally performed, it can only be avoided by showing a wicked intention to break the law; and for this purpose knowledge of what the law is becomes material. *Waugh v. Morris*, L. R., 8 Q. B. 202.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intends to smuggle them into this country, provided he takes no actual part in the illegal adventure, as by packing, &c. *Pellocat v. Angell*, 2 C. M. & R. 311. A brewer delivering beer to an unlicensed keeper of the public-house, may maintain an action against him for the price. *Brooker v. Wood*, 5 B. & Ad. 1052. A municipal corporation may be sued for money lent, though for purposes which were *ultra vires*, and though secured by a covenant in a mortgage, which they had made without the consent of the treasury, as required by stat. 5 & 6 Will. 4, c. 76. *Payne v. Brecon, Mayor of*, 3 H. & N. 572; 27 L. J., Ex. 495. So if trustees lend their trust money to A. they may recover it from A., although such loan be *ultra vires*. *Coltman v. Coltman*, 19 Ch. D. 64, C. A.

If a foreigner contract abroad with an Englishman to do an act legal there, but illegal in England, as to buy slaves of him, the foreigner may sue here on the contract. *Santos v. Illidge*, 8 C. B., N. S. 861; 29 L. J., C. P. 348, Ex. Ch. The principle of this case seems to have been overlooked in *Rousillon v. Rousillon*, 14 Ch. D. 351, *cor. Fry J.*

Illegality—Weights and Measures Act, 1878.] Under 41 & 42 Vict. c. 49, s. 19, which came into force (sect. 2) on 1st January, 1879, "every contract bargain, sale, or dealing, made or had in the United Kingdom for any work, goods, wares, or merchandise, or other thing which has been or is to be done, sold, delivered, carried, or agreed for by weight or measure, shall be deemed to be made and had according to one of the imperial weights or measures ascertained by this act, or to some multiple or part thereof, and if not so made or had shall be void," and by sect. 25, any contract, bargain, sale, or dealing, made by any false weight, measure, scale, &c., shall be void.

Illegality.—Sale of spirituous liquors.] By the Tippling Act (24 Geo. 2, c. 40), s. 12, no person shall maintain any action for any sum, debt or demand whatsoever for or on account of any spirituous liquors, unless such debt shall have been really and *bona fide* contracted at one time to the amount of 20s. or upwards; nor shall any item in any account or demand for such liquors be allowed where the liquors delivered at one time, and mentioned in such item, shall not amount to the full value of 20s., at the least, and that without fraud or covin, and where no part of the liquor so sold shall have been returned, or agreed to be returned, directly or indirectly. This statute is repealed, by the 25 & 26 Vict. c. 38, as to "liquors to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof, in quantities not less at any one time than a reputed

quart." The act extends to the case of a person who purchases liquors in small quantities to retail them again; as the keeper of an eating-house. *Hughes v. Done*, 1 Q. B. 294. And also to the case of a tavern-keeper's bill in which there are items for spirits supplied to the defendant's guests. *Burnyeat v. Hutchinson*, 5 B. & A. 241. And a bill of exchange, part of the consideration for which is spirituous liquor sold in less quantities than of 20s. value was held to be wholly void. *Scott v. Gilmore*, 3 Taunt. 226; *Gaitskill v. Greatehead*, 1 D. & Ry. 359. But, where a bill for 6l. had been accepted by an officer in payment of small quantities of spirits, under 20s., supplied for recruits under the defendant's command, the bill was held valid. *Spencer v. Smith*, 3 Camp. 9. Drunkenness being a punishable offence, a publican cannot recover for beer, furnished to the defendant, after he has become intoxicated by drinking in his public-house. *Brandon v. Old*, 3 C. & P. 440.

The County Courts Act, 1867, (30 & 31 Vict. c. 142), s. 4, provides that no action shall "be brought or be maintainable in any court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry" . . . "consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given, for, in, or towards the obtaining of any such ale," &c.

Illegality—Sale on Sunday.] By the Lord's Day Act, (29 Car. 2, c. 7), s. 1, "no tradesmen, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of *their* ordinary callings, upon the Lord's day, or any part thereof, works of necessity and charity only excepted." Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. *Fennell v. Ridler*, 5 B. & C. 408. But, where A., not knowing that B. was a horse-dealer made an oral bargain with him on a Sunday for the purchase of a horse, and the price, which was above 10l., was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Blozsome v. Williams*, 3 B. & C. 232; see *Norton v. Powell*, 4 M. & Gr. 42, and *Beaumont v. Brengeri*, 5 C. B. 301. Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow*, 4 Bing. 84. But, where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit*. *Williams v. Paul*, 6 Bing. 653. The statute does not make every work or business done on the Sunday illegal; but only carrying on trade and ordinary callings on that day. Therefore the hiring of a servant by a farmer on a Sunday is good. *R. v. Whitnash*, 7 B. & C. 596; see also *Scarfe v. Morgan*, 4 M. & W. 270, and *Begbie v. Levi*, 1 C. & J. 180. So is a guarantee, given for the faithful services of a tradesman's traveller; *Norton v. Powell*, *supra*; and a contract for enlisting a soldier. *Wolton v. Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73. A farmer does not come within the provisions of this statute. *R. v. Silvester*, 33 L. J., M. C. 79, Q. B.

Illegality—Contract by bankrupt.] The Bankruptcy Act, 1883, contains no provisions avoiding contracts made for the payment of debts barred by bankruptcy, or securities given to induce the forbearance of creditors pending proceedings in bankruptcy; but any agreement whereby proceedings in bankruptcy, or the distribution of the assets is affected, is void as against

the policy of the law. Thus a promissory note given by a third person to a creditor in order to induce him to forbear from opposing an insolvent's petition, was void. *Hills v. Mitson*, 8 Exch. 751; 22 L. J., Ex. 273; *Hall v. Dyson*, 17 Q. B. 785; 21 L. J., Q. B. 224. So, a guarantee given to a creditor to induce him to accept a composition; *McKewan v. Sanderson*, L. R., 20 Eq. 65; or to secure the payment of notes given for the like purpose, is void. *Clay v. Ray*, 17 C. B., N. S. 188; *Geere v. Mare*, 2 H. & C. 339; 33 L. J., Ex. 50. An agreement of this kind, otherwise illegal, was not the less void because it had been made with the knowledge of the other creditors, and sanctioned by the Commissioners in Bankruptcy. *Humphreys v. Willing*, 1 H. & C. 7; 32 L. J., Ex. 33. See also *Blacklock v. Dobie*, 1 C. P. D. 265; *Rimini v. Van Praagh*, L. R., 8 Q. B. 1.

An agreement contrary to the policy of the winding-up acts is void. *Elliott v. Richardson*, L. R., 5 C. P. 744.

Illegality—Contract in restraint of trade.] All restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is that, though every man is to remain at liberty to work for himself; yet when he has obtained something he wants to sell, he should be at liberty to sell it to the best advantage, and for this purpose, must be able to preclude himself entering into competition with the purchaser. In such case a stipulation, however restrictive, will be good if the restriction is not, in the judgment of the court, unreasonable, having regard to the subject-matter of the contract. *Leather Cloth Co. v. Lonsont*, L. R., 9 Eq. 345, 353, 354, *per James, V.-C.* Thus a contract to restrain a man from trading at all, or if made without consideration, is illegal and void, as against public policy; but a contract in which the restraint is limited in respect of time or space is legal, if founded on good consideration. *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Smith's L. C. The court will not, however, enquire into the adequacy of the consideration. *Pilkington v. Scott*, 15 M. & W. 657, 660, *per Alderson, B*; *Collins v. Locke*, 4 Ap. Ca. 674, 686, *per P. C.* Where the restriction is divisible and is good as to part, and bad as to the rest, the court will give effect to the former part. *Price v. Green*, 6 M. & W. 346, Ex. Ch. Numerous cases are reported as to what contracts have been adjudged to be reasonable; an enumeration of them would be beyond the scope of the present work: they will be found collected in the notes to *Mitchell v. Reynolds*, 1 Smith's Lead. Cas.; see also *Collins v. Locke*, *supra*.

It may be observed that in a contract not to carry on a trade within a specified distance, the distance is to be measured "as the crow flies," *i.e.*, by a straight line on a map, and not by the nearest mode of practicable access. *Mouflet v. Cole*, L. R., 8 Ex. 32, Ex. Ch.

As to trade unions see stat. 34 & 35 Vict. c. 31, ss. 3, 4, and *Rigby v. Connol*, 14 Ch. D. 482; and *Wolfe v. Matthews*, 21 Ch. D. 194, decided thereon.

Illegality—Immorality.] One who is a party to an immoral contract cannot enforce it. Thus the price of obscene and libellous prints cannot be recovered. *Fores v. Johnes*, 4 Esp. 97. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff, who kept a house of ill-fame, and partook of the profits of her prostitution, it was held that such a demand could not be supported. *Howard v. Hodges*, 1 Selw. N. P. 13th ed., 80. But, a person may recover for goods sold to a prostitute, not being evidently sold to enable her to carry on prostitution. *Bowry v. Bennet*, 1 Camp. 348. So, where the plaintiff was employed to wash clothes for a prostitute, knowing her to be such and the clothes consisting principally of

expensive dresses and men's nightcaps, it was held that she was entitled to recover. *Lloyd v. Johnson*, 1 B. & P. 340. So, for lodgings let to one, if not knowingly let for the purpose of prostitution. *Crisp v. Churchill*, cited 1 B. & P. 340; *Jennings v. Throgmorton*, Ry. & M. 251. But, after plaintiff has become aware of the purpose for which they were let, he cannot recover. *S. C.*; *Smith v. White*, L. R., 1 Eq. 626. So, the hire for a brougham cannot be recovered from a prostitute where the coachmaker knew her to be such, and supplied the brougham knowing it was to be used by her, as part of her display to attract men. *Pearce v. Brooks*, L. R., 1 Ex. 213. It is unnecessary that the plaintiff should have looked expressly to the proceeds of the defendant's prostitution, for payment. *Id.*; overruling, on this point, *Bowry v. Bennet*, *supra*. See *Taylor v. Chester*, L. R., 4 Q. B. 309.

Where a bond has been given, by a man to his concubine, it is not to be presumed from the subsequent continuance of the cohabitation, that it was given to secure such cohabitation, and therefore for an immoral consideration. *Vallance v. Blagden*, W. N. 1884, p. 60, Kay, J.

Infancy.

That the defendant was an infant at the time of the contract made, is a good defence, unless the action be for necessities; the defence must be specially pleaded. Rules, 1883, O. xix., r. 15, *ante*, p. 283.

Where the action, though in form *ex contractu*, is, in fact, founded upon *tort*, infancy will be no defence. *Burnand v. Haggis*, 14 C. B., N. S. 45; 32 L. J., C. P. 189. Thus an action for money had and received lies against an infant for money which he has appropriated by fraud or embezzlement. *Bristow v. Eastman*, 1 Esp. 172. But, if the action be founded on mere fraudulent representation, infancy is a defence. *Johnson v. Pye*, 1 Sid. 258; see also *Liverpool Adelphi v. Fairhurst*, 9 Exch. 422, the case of a feme covert. It seems, since the J. Act, 1873, to be an answer to the defence of infancy that the infant fraudulently represented himself to be of full age. *Ex pte. Unity Joint Stock Mutual Banking Association*, 3 D. G. & J. 63; 27 L. J., Bky. 33: see cases cited in *Lemprière v. Lange*, 12 Ch. D. 675.

In calculating age fractions of days are disregarded, thus a person born on Sept. 3rd, becomes of age on Sept. 2nd, 21 years afterwards. *Anon.* cited *per Holt*, C. J., 1 Ld. Raym. 480.

What are necessities.] An infant may bind himself for necessities, that is, for meat, drink, apparel, lodging, medicines, &c., and also for his good teaching or instruction. Co. Litt. 172 a; Com. Dig. Infant (B. 5). The question of what are necessities is to be governed by the fortune and circumstances of the infant; and the proof of those circumstances lies on the plaintiff; *per* Ld. Kenyon, C. J.; *Ford v. Fothergill*, 1 Esp. 211; *Ryder v. Wombwell*, L. R., 4 Ex. 32, Ex. Ch., reversing S. C., L. R., 3 Ex. 90. They may be necessities, without being absolutely requisite for bare subsistence. *Peters v. Fleming*, 6 M. & W. 42. It is a mixed question of law and fact to be left to the jury, subject to the opinion of the court as to the manner in which the jury have exercised their judgment. *Harrison v. Fane*, 1 M. & Gr. 550, 553; *Wharton v. Mackenzie*, 5 Q. B. 606. The judge must decide whether the case is such as to cast on the plaintiff the onus of proving that the articles are necessities, and then whether there is any evidence to satisfy that onus; if the judge requires such evidence, and the plaintiff do not produce any, the judge is bound to nonsuit, and ought not to leave the case to the jury. *Ryder v. Wombwell*, L. R., 4 Ex. 40, *per* Ex. Ch. An infant, a captain in the army, has been held liable for a livery ordered by him for his servant; but not for cockades for the soldiers of his company.

Hands v. Slaney, 8 T. R., 578; and see *Coates v. Wilson*, 5 Esp. 152. So, an infant may contract to pay a fine due upon his admission to a copyhold estate; *Evelyn v. Chichester*, 3 Burr. 1717; or, for necessities supplied to his wife. *Turner v. Trisby*, 1 Str. 168; B. N. P. 155. A fair contract for work and labour to be done by him is binding. *Wood v. Fenwick*, 10 M. & W. 195; *Cooper v. Simmons*, 7 H. & N. 707; 31 L. J., M. C. 138; *Leslie v. Fitzpatrick*, 3 Q. B. D. 229. But, not if such contract is inequitable; S. C.; *R. v. Lord*, 12 Q. B. 757; as if his master reserves a right to stop wages at will; S. C. See *Meakin v. Morris*, W. N. 1884, Q. B. D.

In an action for a trousseau, supplied to a female infant before her marriage, it was held that the true test of whether the goods supplied were necessities, was the real position of the future husband in society, and not the apparent or assumed condition he might take upon himself. *Stacy v. Firth*, 16 L. T., N. S. 498, Lush, J. A female infant, who has no property of her own to settle, may contract with a solicitor for the expenses of a marriage settlement. *Helps v. Clayton*, 17 C. B., N. S. 553; 34 L. J., C. P. 1. So, she may bind herself for the expenses of her husband's funeral, though he left no assets. *Chapple v. Cooper*, 13 M. & W. 252.

It is not material to the defence whether the infant was in fact supplied by his friends with an allowance sufficient to buy all necessities with ready money. *Burghart v. Hall*, 4 M. & W. 727. Nor, is it a condition precedent to recovery, that the plaintiff should have made inquiry as to the necessity of the articles sold, before he supplied them. *Brayshaw v. Eaton*, 5 N. C. 231; S. C. 7 Scott, 183; *Dalton v. Gib*, 5 N. C. 198. In order to rebut the evidence that the goods supplied to him were necessities, the defendant may show that he was already supplied with a sufficiency of similar goods, although this was not known to the plaintiff. *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Brayshaw v. Eaton*, 7 Scott, 183; *Foster v. Redgrave*, L. R., 4 Ex. 35, n., Q. B. In *Ryder v. Wombwell*, L. R., 3 Ex. 90 (*diss.* Bramwell, B.), however, the Exch. held the evidence to be inadmissible, and the Ex. Ch. left the point undecided. In *Bainbridge v. Pickering*, *supra*, it was held that a female infant residing with her mother, and supplied by her with necessities, could not be liable at all, as it was for the mother to decide what articles were necessities for her daughter.

What are not necessities.] Although an infant may enter into a partnership, he will not be liable for the contracts of the partnership made during his infancy; but he will be liable upon such contracts made after his full age, unless he notifies his disaffirmance of the partnership. *Goods v. Harrison*, 5 B. & A. 147, Ex. Ch. An infant is not liable upon an account stated, even though it appears to be for necessities; nor can the account stated be used as evidence by way of admission on the part of the defendant to show that necessities have been supplied to that amount. *Ingledeu v. Douglas*, 2 Stark. 36. Nor is he liable for money lent, though it has been laid out in necessities. *Darby v. Boucher*, 1 Salk. 279; *Probart v. Knouth*, 2 Esp. 472, n. And now see Infants' Relief Act, 1874, s. 1, *post*, p. 600. He is not liable on a bill of exchange, though given for necessities. *Williamson v. Watts*, 1 Camp. 552. But, he is liable on a bill accepted by him after 21, though drawn before. *Stevens v. Jackson*, 4 Camp. 164. Where goods, not being necessities, are delivered to a carrier for an infant, the infant cannot be charged, though the goods do not reach him till after he is of age. *Griffin v. Langfield*, 3 Camp. 254. An infant cannot be sued on a warranty of a horse. *Hovlett v. Haswell*, 4 Camp. 118. An infant lieutenant in the navy is not liable for the price of a chronometer, he being out of employment at the time of its being furnished. *Berolles v. Ramsay*, Holt, N. P. 77. Dinners, confectionery, and fruit, supplied to an undergraduate out of college, are not *prima facie* necessities. *Brooker v. Scott*, 11 M. & W. 67;

Wharton v. Mackenzie, and *Cripps v. Hills*, 5 Q. B. 606. And articles supplied cannot be considered as suitable necessities, if they are merely of an ornamental character, as gold rings, &c.; see *Peters v. Fleming*, 6 M. & W. 42, *per cur.*; or betting books. *Jenner v. Walker*, 19 L. T., N. S. 398, *cor.* Cockburn, C. J. Cigars and tobacco, cannot be necessities, in the absence of special circumstances rendering them necessary, medicinally or otherwise, for the infant. *Bryant v. Richardson*, L. R., 3 Ex. 93, n., and see *Ryder v. Woombwell*, *ante*, p. 598.

If issue is joined on the goods being necessities, the plaintiff need not prove that *all* are necessities, but may recover *pro tanto*; *per cur.* in *Tapley v. Wainwright*, 5 B. & Ad. 399.

Ratification of promise after full age.] A contract by an infant, other than for necessities, was formerly voidable only, not void, and was therefore capable of being ratified by him after he had attained his majority; but now, by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1, "all contracts, whether by specialty or by simple contract, henceforth entered into by infants, for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void, provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." Such contracts are therefore no longer capable of ratification. And by sect. 2, "no action shall be brought whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." This applies to a ratification after the passing of the act, although the promise was made before its passing. *Ex pte. Kibble*, L. R., 10 Ch. 373. It applies to an infant's promise to marry. *Coxhead v. Mullis*, 3 C. P. D. 439. See also *Ditcham v. Worrall*, 5 C. P. D. 410. It extends to a set-off; see *Rawley v. Rawley*, 1 Q. B. D. 460, C. A., decided on similar words in 9 Geo. 4, c. 14, s. 5.

Infant Shareholders.] The liability to calls of infants holding shares in joint-stock and other companies is considered, *post*, Part III. *Actions by companies*, 2—*Special defences—Infancy*.

If the action be on a contract for the sale of shares by the plaintiff to the defendant, a simple defence of infancy is enough, for an infant is not compellable to complete an agreement to buy them.

Infancy—how proved.] Infancy may be proved by calling any person who can speak as to the time of his birth; or by declarations of deceased members of his family mentioning the time of his birth, p. 43. As to whether a certificate of birth can be used for this purpose, *vide ante*, p. 120. A certificate of baptism cannot so be used, *ante*, p. 203. If the defendant was of age when the action was commenced, the date of the contract must be shown, as well as his non-age at that date. But where the defendant pleaded infancy to an action against him as acceptor of a bill, it was held that the acceptance, not being dated, ought to be presumed to have been made shortly after the date of the bill itself according to the common practice, the drawer and acceptor not living far apart; therefore, where a bill at four months was dated 9th November, 1850, and the defendant came of age in March, 1851, the jury rightly presumed that he was not of age when he accepted. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J., C. P. 69.

Insanity.

It is not a good defence that the defendant, at the time of the contract entered into, was of unsound mind, unless the plaintiff knew of it, and took advantage of that circumstance to impose upon him. *Browne v. Joddrell*, M. & M. 105; *Lery v. Baker*, *Id.* 106, n. The inquiry as to the necessity of the goods supplied, and their suitability to the defendant's condition, may arise on this plea as in that of infancy. See *Baxter v. Portsmouth*, *El. of*, 5 B. & C. 170. As to the liability of a lunatic on an implied contract for necessities supplied to him, see *In re Weaver*, 21 Ch. D. 615, C. A., and cases there cited. A lunatic is liable for necessities supplied to his wife; *Read v. Legard*, 6 Exch. 637; 20 L. J., Ex. 309, or moneys expended for her protection. *Williams v. Wentworth*, 5 Beav. 325. The rule is, that the contracts of a lunatic, entered into fairly and *bona fide* with a person, ignorant of his incapacity, where the transaction is in the ordinary course (as the purchase of an annuity), and is wholly or in part executed, are valid. *Molton v. Camroux*, 2 Exch. 487; Ex. Ch., 4 Exch. 17. Insanity, and the probable knowledge of it by the adverse party, may be proved by showing that it existed and was apparent, either shortly after or shortly before, the alleged contract. *Beavan v. McDonnell*, 9 Exch. 309; 23 L. J., Ex. 326. The mere existence of a delusion in the mind of the defendant, although connected with a contract made by him, is not sufficient to avoid such contract; it is a question for the jury whether the delusion affected the contract. *Jenkins v. Morris*, 14 Ch. D. 674, C. A. See further, *post*, *Action for recovery of land by devisee—Incapacity from idiocy or non-sane memory*.

As to the liability of a principal on contracts entered into on his behalf, by an agent, after the principal has become insane, see *Drew v. Nunn*, 4 Q. B. D. 661, C. A., cited *ante*, p. 498.

Intoxication.

A contract entered into by a person in a state of intoxication is in a similar position to one made by an insane person; see *Molton v. Camroux*, *supra*; it is voidable, not void; *Matthews v. Baxter*, L. R., 8 Ex. 132. See further as to this defence, *Gore v. Gibson*, 13 M. & W. 623.

Limitation, Statutes of.

The statutes of limitation must be specially pleaded, Rules, 1883, O. xix., r. 15, *ante*, p. 283; and upon issue joined thereon the burden of proof lies on the plaintiff. *Wilby v. Henman*, 2 Cr. & M. 658. The commencement of the action is the date of the issuing of the original writ of summons, Rules, 1883, O. ii., r. 1; this date is stated on the statement of claim; App. C., sect. 1; and would seem, subject to amendment, to be conclusive evidence thereof; see *Harper v. Philipps*, 7 M. & Gr. 397; *Whipple v. Manley*, 1 M. & W. 432; but after the lapse of six years, strict proof of the regular continuance by other writs was necessary in order to rebut this defence. *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J., C. P. 161. But the first writ is now kept alive by renewal under Rules, 1883, O. viii., r. 1. Under this rule the renewal must be made within 12 months in the case of an original writ, and six months in the case of a renewed writ. The day of renewal is included in such respective times for renewal. *Anon.*, 1 H. & C.

664; 32 L. J., Ex. 88; *Fisher v. Cox*, 16 L. T., N. S. 397, Q. B., decided on C. L. P. Act, 1852, s. 11. As it was held unnecessary to reply specially, the issuing and return of successive writs under 2 Will. 4, c. 39 (*Higgs v. Mortimer*, 1 Exch. 711), so it seems to be unnecessary to reply the renewal of the original writ under the new process now substituted. By Rules, 1883, O. viii., r. 2, the production of a writ, purporting to be marked with the seal of the court showing the same to have been renewed according to rule 1, shall be sufficient evidence of such renewal, and of the commencement of the action, as of the first date of such renewed writ for all purposes.

A misdated writ, with its indorsement, is amendable under Rules, 1883, O. xxviii., r. 12, *ante*, pp. 269, 270, according to the facts; though the effect may be to defeat the statute of limitations. See *Cornish v. Hockin*, 1 E. & B. 602; 22 L. J., Q. B. 142. But, there is no power to alter the true date. *Clarke v. Smith*, 2 H. & N. 753; 27 L. J., Ex. 155.

The time of limitation is to be computed exclusively of the day on which the cause of action arose. *Hardy v. Ryle*, 9 B. & C. 603; *Freeman v. Read*, 4 B. & S. 178; 32 L. J., M. C. 226.

The principal Statutes of Limitation applicable to personal actions are—21 Jac. 1, c. 16; 4 & 5 Anne, c. 3 (c. 16, Ruff.); 9 Geo. 4, c. 14 (Ld. Tenterden's Act); 3 & 4 Will. 4, c. 27, s. 40; 3 & 4 Will. 4, c. 42, ss. 3 to 7; 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856); and 37 & 38 Vict. c. 57, s. 10 (Real Property Limitation Act, 1874), cited *post*, p. 639.

Foreign Statutes of Limitation, which bar the remedy only, and not the right, have no operation here. *Huber v. Steiner*, 2 N. C. 202; *Alliance Bank of Simla v. Carey*, *post*, p. 603; even after judgment for the defendant in the foreign court on a plea of the foreign statute; *Harris v. Quine*, L. R., 4 Q. B. 653.

By stat. 21 Jac. 1, c. 16, s. 3, actions of account, and on the case (other than concerning the trade of merchandise between merchants or their factors or servants, and other than for slander), actions of debt on lending or contract without specialty, or for rent arrear, are to be brought within six years after the cause of action, and not after.—Under the head “case” is here included assumpsit on promises, and the part of the statute above cited therefore includes all the causes of action founded on simple contract, whether expressed to be for a debt, or on a promise or contract, express or implied, formerly prosecuted in the form of debt or assumpsit.

The exception in this statute of merchants' accounts was held to apply only to actions of account, or, perhaps, for not accounting; or at all events only to cases in which account would lie. *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & Gr. 271. And by 19 & 20 Vict. c. 97, s. 9, this exception has been abolished, and all such actions shall be commenced within six years after the cause of action, and no claim in respect of a matter which arose more than six years before such action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action.

An action of debt on the bye-law of a chartered company is an action on a contract without specialty; *Tobacco Pipe Co. v. Loder*, 16 Q. B. 765; 20 L. J., Q. B. 414; so, is an action for calls by a company established under an act of a colonial legislature. *Welland Ry. Co. v. Blake*, 6 H. & N. 410; 30 L. J., Ex. 161. But, an action given by statute, as for calls on a shareholder in a company, under the Companies Clauses Consolidation Act, 1845, is founded on specialty. *Cork & Brandon Ry. Co. v. Goode*, 13 C. B. 826; 22 L. J., C. P. 198. The liability of a member or contributory of a joint-stock company incorporated under the Companies Act, 1862, to pay calls, is,

under sects. 16, 75, 76, a debt in the nature of a specialty debt; whereby the heirs are bound. *Buck v. Robson*, L. R., 10 Eq. 629. So, where an unregistered company is wound up under that act. *In re Muggeridge*, *Id.* 443. Where the liability of the members of a non-corporate co-partnership is fixed by a deed of settlement, the liability is a specialty debt. *Helby's, Stokes', and Horsey's cases*, L. R., 2 Eq. 167. An instrument under seal, executed in India, is here treated as a specialty, although by Indian law specialty debts have no greater efficacy than simple contract debts, and both are barred by the lapse of three years. *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.

The stat. 21 Jac. 1, c. 16, s. 3, *ante*, p. 602, having been construed somewhat strictly so as to exclude cases which were not, when it passed, regarded as contracts, the stat. 3 & 4 Will. 4, c. 42, s. 3, enacted that actions of debt on an award (where the submission is not by specialty), or for copyhold fines, or an escape, or money levied on a *fi. fa.*, should be brought within six years after the cause of action.

As to the application of the Statutes of Limitation in actions by and against executors, *vide post*, Part III., *sub tit.*, *Actions by and against Executors*.

The Statutes of Limitation applicable to money charged on, or payable out of land, and also to rent, will be found *post*, pp. 638, *et seq.*

By the J. Act, 1873, s. 25 (2), "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." As to the meaning of "express trust," see *Banner v. Berridge*, 18 Ch. D. 254, and cases there cited. But where a remedy in equity was correspondent to the remedy at law, the Court of Equity acted by analogy to the Statute of Limitations, and imposed on the remedy it afforded, the same limitation that would be imposed on the proceedings at law. *Knox v. Gye*, L. R., 5 H. L. 656, 674; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319, C. A., and the statutes now apply to actions for all such claims as fall within them in whatever divisions of the High Court the action may be brought. *Bray v. Tofield*, 18 Ch. D. 551, 554; *Gibbs v. Guild*, 9th Q. B. D. 59, 64, 67. And now see also the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, cited *post*, p. 639.

Claims chargeable against the separate estate of a married woman are not barred by the Statute of Limitations. *Hodgson v. Williamson*, 15 Ch. D. 87.

[When the statute begins to run.] The statute begins to run from the time of the breach of promise or contract, and not the discovery of it. Therefore in an action against a solicitor for neglecting his duty six years before, the statute was held a bar, though the omission were only discovered within the six years; *Short v. McCarthy*, 3 B. & A. 626; *Batiley v. Faulkner*, *Id.* 288; *Colvin v. Buckle*, 8 M. & W. 680; and formerly at law, this was the rule although the defendant had fraudulently concealed the cause of action. *Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39; 23 L. J., Ex. 303. But the rule of equity which now prevails (see J. Act, 1873, s. 25, (11), *ante*, p. 282), at any rate in a case in which a court of equity would have had concurrent jurisdiction, is that in the case of fraudulent concealment of the cause of action, the statute runs from its discovery only; *Brooksbank v. Smith*, 2 Y. & C. Ex. 58; *Ecclesiastical Commissioners v. N. E. Ry. Co.*, 4 Ch. D. 845; *Metropolitan Bank v. Heiron*, *supra*; *Gibbs v. Guild*, 9 Q. B. D. 59, C. A.; unless the plaintiff by reasonable diligence might have discovered it sooner. *Denys v. Shuckburgh*, 4 Y. & C. Ex. 42. See further Story, Eq. Jur. § 1521. Where a contract to deliver goods is once broken, the statute

runs, and a subsequent refusal to deliver after the loss of the goods, during an inquiry touching the first breach will not revive the right. *E. Inds. Co. v. Paul*, 7 Moo. P. C. 85. Upon promises to indemnify, the statute runs from the time of damnification. *Huntley v. Sanderson*, 1 Cr. & M. 467; *Reynolds v. Doyle*, 1 M. & Gr. 753. Where a bill of exchange is drawn, payable at a future time, for a sum of money lent by the payee to the drawer, at the time of drawing the bill, the payee may sue for money lent, at any time within six years from the time when the money was to be repaid; i.e. when the bill became due, and not from the time of the loan. *Wittersheim v. Carlisle, Cs. of*, 1 H. Bl. 631; *Wheatley v. Williams*, 1 M. & W. 533. Where a loan is made by the plaintiff to the defendant by a cheque, the statute does not begin to run till the payment of the cheque by the plaintiff's bankers. *Garden v. Bruce*, L. R., 3 C. P. 300. Where a bill is not accepted, and the holder gives notice thereof to the drawer, the statute begins to run against him; and he does not acquire a fresh right of action against the drawer on the non-payment when due. *Whitehead v. Walker*, 9 M. & W. 506. The defendant drew a bill, due in May, 1843, payable to the plaintiff, who indorsed it for the acceptor's accommodation, to C.: C. sued the plaintiff on the dishonoured bill in 1847, and received the amount from him in 1850: the plaintiff then sued the defendant on the bill: it was held that the action was barred. *Webster v. Kirk*, 17 Q. B. 944: 21 L. J., Q. B. 159. The accommodation acceptor of a bill of exchange was sued upon it by the holder, whereupon he paid it and sued the person for whose accommodation he accepted, for money paid to his use; it was held that he might do this within six years after payment of the bill, though more than six years after the bill became due. *Angrove v. Tippet*, 11 L. T., N. S. 708; H. T. 1865, Q. B.

A note, payable on demand, is payable immediately, and the statute begins to run from that date. *Christie v. Fousic*, 1 Selw. N. P. 13th ed. 301; *Norton v. Ellam*, 2 M. & W. 461. But, where a note is made payable so many months after demand, the cause of action does not accrue until that number of months after demand made. *Thorp v. Booth*, Ry. & M. 388. So, where the note is payable after sight, the statute runs only from the time of presentment. *Holmes v. Kerrison*, 2 Taunt. 323; and see *Savage v. Aldren*, 2 Stark. 232. Where the cause of action does not arise until after request made, the statute will only run from the time of such request. *Gould v. Johnson*, 2 Salk. 422; 2 Wms. Saund. 63 c, d, (6). So, where S. gave a promissory note to a bank, payable on demand, together with a written agreement stating that the note was deposited with the bank as security for any balance due to them from C., who was about to open an account with them; it was held that the note and agreement must be construed together, and that the statute did not run on the mere existence of a debt from C. to the bank, without a balance having been struck or a demand made on S. *Hartland v. Jukes*, 1 H. & C. 667; 32 L. J., Ex. 162. Where the plaintiff, an attorney, was to look primarily for his costs to a fund in court, and if it were insufficient C. was to pay them, the statute was held not to run till the amount of the fund was ascertained. *Hunter v. Hunter*, 1 R., 3 C. L. 138. Where the defendant promised to pay a bill of exchange barred by the statute "when able," the statute was held to run from the time of his being able, though the plaintiff did not know when this was, and made no demand. *Waters v. Thanet, El. of*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452; *vide post*, p. 614. See also *In re Kensington Station Act*, L. R. 20 Eq. 197.

Money deposited with a banker is money lent to him, and the statute runs from the deposit; *Pott v. Clegg*, 16 M. & W. 321; see *Foley v. Hill*, H. L. C. 28; but *qy.* if this is so with money deposited with a private

person; see Poth. Contr. by Evans, vol. 2, p. 126; and an agent who stands in a fiduciary position to his principal cannot set up the Statute of Limitations. *Burdick v. Garrick*, L. R. 5 Ch. 233; *Flitcroft's case*, 21 Ch. D. 519, C. A. A solicitor is not ordinarily in the position of trustee for his client in respect of moneys received for him. *Watson v. Woodman*, L. R. 20 Eq. 721; nor does a mortgagee hold the proceeds of the sale of mortgaged property on an express trust for the mortgagor. *Banner v. Berridge*, 18 Ch. D. 254.

The contract by a solicitor to conduct a suit is entire, so that if the suit has ended within six years, the Statute of Limitations is not a bar to so much of the demand as is for business relating to the suit not actually transacted within the six years; *Harris v. Osbourn*, 2 Cr. & M. 629; *Martindale v. Faulkner*, 2 C. B. 706; *Harris v. Quine*, L. R., 4 Q. B. 653; for the solicitor cannot sue for his costs while the suit is progressing, although he may refuse to proceed for want of funds. *Whitehead v. Lord*, 7 Exch. 691; 21 L. J., Ex. 239. See, however, *In re Hall & Barker*, 9 Ch. D. 538.

Disabilities.] The act 21 Jac. 1, c. 16, s. 7, provides that, if the plaintiff be an infant, covert, non compos, in prison, or beyond seas (as to which now *vide infra*), when the action accrues, the six years shall run from the removal of the disability, or from his return from beyond seas, as the case may be. In the case of a defendant beyond seas at the time of action accrued the action may be brought within six years after his return, by stat. 4 & 5 Anne, c. 3, (c. 16 Ruff.), s. 19. In both cases a special reply is necessary.

By 3 & 4 Will. 4, c. 42, s. 4, if a person entitled to any action mentioned in that act [*ante*, p. 603] is, at the time of the accruing of the cause, under age, covert, non compos, or beyond seas (*vide infra*), he may bring it within six years after coming of age, &c.; and if a person against whom the action accrues shall then be beyond seas, the action may be brought within six years after his return. By sect. 7, no part of the United Kingdom, the Isle of Man, or the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within the meaning of this act, or of the stat. 21 Jac. 1, c. 16.

But now by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10, no person shall be entitled to any further time by reason only that such person, or one or more of such persons, was beyond seas or was in prison when the cause accrued. This section is retrospective, and bars those causes of action falling within its provisions, which accrued, but on which no action was commenced, prior to the passing of the act. *Pardo v. Bingham*, L. R. 4 Ch. 735, following *Cornill v. Hudson*, 8 E. & B. 429; 27 L. J., Q. B. 8. By sect. 11, in the case of joint debtors, the statutes will now run as to such as are not beyond seas, though some of the debtors may be beyond seas; but a judgment recovered in such cases will not *per se* be a bar to another action against the absent debtor after his return. It would appear from the terms of this section that the case of a judgment recovered against one of the joint debtors, who was beyond the seas at the time the cause of action accrued, is not within its remedial operation, and that such a judgment would still be a bar to a subsequent action against any other of the joint debtors. Sect. 12 enacts that no part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within either 4 & 5 Anne, c. 3, or of this act. This section is not retroactive. *Flood v. Paterson*, 29 Beav. 295; 30 L. J., Ch. 486.

The proviso in case of persons beyond seas extends as well to persons

resident abroad as to the natives of England, and the word "return" in the acts does not imply that they must have been in this country before. *Lafond v. Ruddock*, 13 C. B. 813; 22 L. J., C. P. 217; *Pardo v. Bingham*, ante, p. 605.

As to the meaning of "beyond the seas" in 21 Jac. 1, c. 16, s. 7, see *Ruckmaboye v. Mottrichund*, 8 Moo. P. C. 4.

When the statute once begins to run, no subsequent disability will prevent its operation. See *Cotterell v. Dutton*, 4 Taunt. 826; and *Rhodes v. Smethurst*, 6 M. & W. 351.

Subsequent acknowledgment.] The effect of the Statute of Limitations may be avoided by proof of an unqualified acknowledgment of the debt within six years, which is evidence of a new promise to pay the debt, and not a mere revival of the original promise. *Heyling v. Hastings*, 1 Ld. Raym. 421; *Hurst v. Parker*, 1 B. & A. 93. An oral promise was, before Ld. Tenterden's Act, held sufficient to revive even a written guarantee, not under seal. *Gibbons v. M'Casland*, 1 B. & A. 690. The rule was that a subsequent promise was admissible, under a denial of the plea, to defeat the statute, when it proved, or was evidence of the promise or other contract of the defendant as stated in the declaration. It seems, however, that if the plaintiff relies on an acknowledgment to rebut a defence of the statute he must state it in his claim or reply, as the omission would be calculated to take the defendant by surprise. See Rules, 1883, O. xix., r. 15, ante, p. 283.

By the 9 Geo. 4, c. 14, s. 1, in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the stat. 21 Jac. 1, c. 16, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, &c., shall lose the benefit of the said enactments, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them; provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also, that in actions against two or more such joint contractors, &c., if it shall appear at the trial, or otherwise that the plaintiff though barred by the stat. 21 Jac. 1, c. 16, or this act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

By sect. 3, "no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

By sect. 4, the stat. 21 Jac. 1, c. 16, "and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off, on the part of any defendant, either by plea, notice, or otherwise."

The most material change in the law made by this act is the requiring of an acknowledgment or promise in writing signed by the party charge-

able. No alteration is introduced in the language of the required acknowledgment or promise, or with regard to the party to whom it is to be made. See *Haydon v. Williams*, 7 Bing. 163, 166. No particular form is specified: a paper signed by the defendant, though without date, address, or amount due, may be sufficient: *Hartley v. Wharton*, 11 Ad. & E. 934; and although it was formerly held that it must appear what debt is intended; *Kennett v. Milbank*, 8 Bing. 38; this principle is now disregarded, see *Green v. Humphreys*, 23 Ch. D. 207, and cases cited *post*, p. 611. But an acknowledgment, to take the case out of the statute, must still be such as implies a definite promise to pay. *Bristocke v. Smith*, 1 Cr. & M. 483.

An oral statement of an account within six years, and a promise to pay the balance, takes the original debt out of the statute by giving a new cause of action on the account stated, provided there are really items of account on both sides. *Smith v. Forty*, 4 C. & P. 126; *Ashby v. James*, 5 M. & W. 542. See *per Alderson, B.*, in *Hopkins v. Logan*, 11 M. & W. 248. But a mere oral statement of an antecedent debt without any new contract or consideration, made within six years, does not constitute a sufficient new cause of action to prevent the operation of the statute. *Jones v. Ryder*, 4 M. & W. 32.

Acknowledgment by part payment.] Part payment of the debt is an acknowledgment of its existence, and, as such, has always been held to take a case out of the statute, as evidence of a fresh promise to pay the debt; and as *Ld. Tenterden's Act* leaves the effect of payment as before, the cases relating to part payment are still to be considered as authority. The payment must be such as to warrant the jury in inferring an intention to pay the rest; thus, if the defendant, on paying a part, says that "he owes the money, but will not pay it," this will not entitle the plaintiff to a verdict, unless the jury think that the latter words were spoken in jest. *Wainman v. Kynman*, 1 Exch. 118. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt. *Tippets v. Heane*, 1 C. M. & R. 252. Therefore, payment of a dividend by the assignee under the Insolvent Act did not take the debt out of the statute; *Davies v. Edwards*, 7 Exch. 22; 21 L. J., Ex. 4; nor does such a payment by the inspectors of the debtor's inspectorship deed; *Ex pte. Topping*, 34 L. J., Bky. 44; nor, payment under a judgment in a defended county court action. *Morgan v. Rowlands*, L. R. 7 Q. B. 493. But, payment of interest on a mortgage debt by a receiver of the estate appointed by order of the court has been held, under 3 & 4 Will. 4, c. 27, s. 40, to prevent that statute from operating as a bar. *Chinnery v. Evans*, 11 H. L. C. 115, and see *Cronin v. Dennehy*, 1 R., 3 C. L. 289. See *Action on specialty, Statutes of Limitation, post*, p. 639. It has been said that a part payment where there are two debts, without any appropriation of it, is insufficient to take either out of the statute. *Burn v. Boulton*, 2 C. B. 476; *Mills v. Fowkes*, 5 N. C. 455. But *Martin, B.*, seems to doubt this in *Collinson v. Margesson*, 27 L. J., Ex. 305. And it is otherwise if the debts consist of supplies of the same nature; and even where the debts are unconnected, it may be proper to leave the payment to the jury as evidence of a payment on account of all of them. *Walker v. Butler*, 6 E. & B. 506; 25 L. J., Q. B. 377; and see *Evans v. Davies*, 4 Ad. & E. 840. An appropriation of one payment by the creditor, without the debtor's knowledge or assent, is not *per se* enough to take any particular debt out of the statute; and it seems that where a debtor on two separate notes pays interest on account generally, after one had been barred by the statute, it ought to be taken *prima facie* as paid on account of the note not barred,

and not to be applied exclusively by the credit to the note that is barred; per *Ld. Cranworth, Nash v. Hodgson*, 6 D. M. & G. 474, 482; 25 L. J., Ch. 186, 188. Payment into court as to part of a debt will not, it would seem, take the case out of the statute raised as a defence to the rest. See *Long v. Greville*, 3 B. & C. 10; *Reid v. Dickons*, 5 B. & Ad. 499. Part payment in goods taken as money will be an answer to the statute. *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stevens*, 4 Ad. & E. 71. Payment of interest on a note, due more than six years ago, will take the note out of the statute. *Bealy v. Greenslade*, 2 C. & J. 61; *Purdon v. Purdon*, 10 M. & W. 562. Part payment may be by bill or note, and this will rebut the statute if so made as to imply a promise to pay the rest, although the bill or note may never be in fact paid. *Turney v. Dodwell*, 3 E. & B. 136; 23 L. J., Q. B. 137. And the delivery of a bill in part payment operates from the delivery, and not from the falling due of the bill. *Irving v. Veitch*, 3 M. & W. 90. To constitute a payment of interest sufficient to take a debt out of the statute, it is not necessary that money should pass between the debtor and creditor, provided the transaction amounts to such a payment. *Maber v. Maber*, L. R., 2 Ex. 153; and see *Amos v. Smith*, 1 H. & C. 238; 31 L. J., Ex. 423.

Where a payment of part is made, as and for a payment of the whole that the defendant admits to be due, such payment will not take the rest out of the statute. *Waugh v. Cope*, 6 M. & W. 824. A payment made to the creditor to the use of his debtor by a third party, cannot be appropriated by the creditor so as to bar the statute. *Waller v. Lacy*, 1 M. & Gr. 54. Where the defendant authorised an agent to offer the plaintiff a part of his debt in discharge of the whole, and, on the plaintiff's refusal so to accept it, the agent exceeded his authority and paid the sum offered in part discharge, it was held that this was not a part payment to bar the statute. *Linsell v. Bonsor*, 2 N. C. 241. But, generally, payment by an authorised agent is payment by the principal, and the authority is a question for the jury.

Where A., B., and C., overseers, borrowed money for the parish, and gave promissory notes, signed by them as overseers, for the amount, payment of interest by the vestry or overseers for the time being, was held to bar the statute in a suit on the notes against the drawers. *Rew v. Pettit*, 1 Ad. & E. 196; *Jones v. Hughes*, 5 Exch. 104. The trustees of certain legatees lent to the defendant part of the trust money upon a promissory note, describing themselves as such trustees; a payment of the principal and interest to one of the legatees within six years was held to take the case out of the statute. *Meggison v. Harper*, 2 Cr. & M. 322; 4 Tyr. 94. A. gave B. a promissory note in order to get an advance on it from B.'s banker; B. indorsed it to his banker, who credited him with the amount: it was held that a payment of interest by B. to his banker within six years did not keep alive the liability of A. to the banker on the note. *Harding v. Edgecumbe*, 28 L. J., Ex. 313. Payment on a note to an administrator, who had neglected to take out administration in the diocese in which the note was *bonum notabile*, was held sufficient to bar the operation of the statute as against a subsequent administrator *de bonis non*. *Clark v. Hooper*, 10 Bing. 480.

Notwithstanding several decisions, beginning with *Willis v. Newham*, 3 Y. & J. 518, to the contrary, it is now settled that a part payment within six years, though proved only by an oral or unsigned admission of the defendant, will take a case out of the statutes. *Cleave v. Jones*, 6 Exch. 573. But, such admission cannot be proved by the production of a book by the plaintiff, confidentially intrusted to him as the defendant's attorney in the course of business, in which book payment of interest by the defendant to the plaintiff within six years was entered. *Cleave v. Jones*, 7 Exch. 421;

20 L. J., Ex. 238, Ex. Ch. An answer to a bill in chancery against the defendant, admitting the payment of certain sums, but denying that they were paid as interest on the alleged debt due to the plaintiff, is enough to take the debt out of the statute, if the jury are satisfied by other evidence that they were in fact so paid; *Baildon v. Walton*, 1 Exch. 617. As to the use of admissions made in the book of a testator of the receipt of interest by him, to rebut the statute when set up against his executor, see *Bradley v. James*, 13 C. B. 822; 22 L. J., C. P. 193; and *ante*, pp. 52, 56, 57.

The 9 Geo. 4, c. 14, s. 1 (*ante*, p. 606), prevents an acknowledgment or promise by one of several co-contractors from taking the case out of the statutes, but part payment was unaffected by that act. *Whitcomb v. Whiting*, 2 Doug. 652; 1 Smith's Leading Cases. But now, by the Mercantile Law Amendment Act, 1856, s. 14, when there are several co-contractors or co-debtors bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor, &c., shall lose the benefit of the Statute of Limitations, so as to be chargeable by reason only of payment of any principal, interest, or other money, by any other co-contractor, co-debtor, executor, &c. As to the effect of such payment by a co-executor, or by a surviving co-contractor, or by the executor of a deceased co-contractor before the last act, see *Slater v. Lawson*, 1 B. & Ad. 396; *Scholey v. Walton*, 12 M. & W. 510; *Atkins v. Tredgold*, 2 B. & C. 23. Sect. 14 of the last act is not retrospective, and payment of a co-contractor before the act still prevents the operation of the Statute of Limitations. *Jackson v. Woolley*, 8 E. & B. 784; 27 L. J., Q. B. 448; Ex. Ch., reversing the judgment below; and overruling *Thompson v. Waithman*, 3 Drew. 628; 26 L. J., Ch. 134. The statute applies even if the payment be made with the knowledge and consent of the defendant, the co-debtor; *per Crompton, J.*, *Jackson v. Woolley*, 8 E. & B. 783, 784; 27 L. J., Q. B. 182. Payment by a continuing partner does not bar the statute as against one who has retired. *Watson v. Woodman*, L. R. 20 Eq. 721; *semble, contra* as to an existing partner. S. C.

Acknowledgment—by whom.] Since 9 Geo. 4, c. 14, an acknowledgment signed by an agent in the name of the principal, and with his assent, was held insufficient in *Hyde v. Johnson*, 2 N. C. 776. But now, by 19 & 20 Vict. c. 97, s. 13, an acknowledgment or promise made in a writing, signed by an agent of the party chargeable thereby, duly authorized to make it, has the same effect as if signed by the party himself. An acknowledgment made by an agent since the passing of this last Act is sufficient to bar the statute in the case of a debt contracted before the Act. *Leland v. Murphy*, 16 Ir. Ch. Rep. 500, M. R.

Even before Ld. Tenterden's Act it was held that, as against an executor, a mere acknowledgment is not sufficient to take the case out of the statute, but there must be an express promise. *Tullock v. Dunn*, Ry. & M. 416; *Scholey v. Walton*, *supra*. Where an action was brought against A., B., and C., the wife of B., upon a joint promissory note made by A. and C. before the marriage of the latter, and the Statute of Limitations was pleaded, it was held that an acknowledgment of the note by A., after the inter-marriage of B. and C., was not evidence to support the issue. *Pittam v. Foster*, 1 B. & C. 248. An admission by a bankrupt in his balance-sheet will not take the debt out of the statute as against his trustee. *Pott v. Clegg*, 16 M. & W. 321; *Ex pte. Topping*, 34 L. J., Bky. 44. An acknowledgment, by an infant under age, of a debt for necessities supplied to him, is an answer to a defence of the statute. *Willins v. Smith*, 4 E. & B. 180; 24 L. J., Q. B. 62.

As to acknowledgment of debt on behalf of a joint-stock company, see *Loundes v. Garnett, &c. Gold Mining Co.*, 33 L. J., Ch. 418.

The 9 Geo. 4, c. 14, s. 1, expressly provided that, in future, a promise by one of several debtors shall not deprive the rest of the benefit of the statute. *Ante*, p. 606.

An agreement stamp is not necessary on instruments given in evidence as acknowledgments; 9 Geo. 4, c. 14, s. 8, and *vide ante* p. 221; but an unstamped promissory note cannot be used for this purpose, for the section does not exempt such an instrument from requiring a note stamp. *Jones v. Ryder*, 4 M. & W. 32; *Parmiter v. Parmiter*, 2 D. F. & J. 526; 30 L. J., Ch. 508; *vide ante*, p. 230.

Acknowledgment—to whom.] Before the case of *Tanner v. Smart*, 6 B. & C. 603, *post*, p. 611, there was a good deal of confusion as to the nature of the acknowledgment which was necessary to take a case out of the Statute of Limitations. It was always considered that the acknowledgment must be made for the benefit of the person who relied upon it, and must correspond with the promise in the count; therefore, in an action by an executrix, a statement by the defendant to her, that "the testator always promised never to distress him for it," was held to be no evidence of a promise to pay made to the testator within six years. *Ward v. Hunter*, 6 Taunt. 210. So, an acknowledgment by the acceptor of a bill, that he was indebted on it to the payee, but that he was not indebted to the drawer, there being no consideration for the bill, was held not sufficient in an action by the drawer. *Easterly v. Pullen*, 3 Stark. 186.

There are, however, several older authorities to show that an admission to a third party, for the benefit of the creditor, is enough, at least under the stat. 21 Jac. 1, c. 16. Thus, an acknowledgment made to a stranger that the debt is owing to the plaintiff, has been held sufficient. *Peters v. Brown*, 4 Esp. 46. So, an acknowledgment in a deed, between the defendant and third persons, of the existence of a debt due to the plaintiffs, who are strangers to the deed. *Mountstephen v. Brooke*, 3 B. & A. 141; and see *Clark v. Hougham*, 2 B. & C. 149; *Halliday v. Ward*, 3 Camp. 32; *Clark v. Hooper*, 10 Bing. 481. So, since Lord Tenterden's Act, an answer and inventory in the Ecclesiastical Court made on the citation of the next of kin, stating the debts due from the estate of the deceased, and signed by the administrator, has been held to rebut a plea of the Statute of Limitations. *Smith v. Poole*, 12 Sim. 17.

On the other hand, it has been doubted whether a promise made by the maker of a note to the payee, while it was in his hands, will be available in a suit by an indorsee against the maker; *Cripps v. Davis*, 12 M. & W. 159; and, with respect to the other cases cited above, it is to be observed that they were mostly decided before the effect of an acknowledgment, as an answer to the statute, had been put on its right footing; and the better opinion is that an admission of a debt, made to a mere stranger, can only repel the statute when it can be properly left to the jury as equivalent to, or implying a promise to, the plaintiff to pay him. See *Everett v. Robertson*, and *Ex pte. Topping*, cited *post*, p. 614; *Howcutt v. Bonser*, and *Forsyth v. Bristowe*, *post*, p. 640, and *Wilby v. Elgee*, L. R., 10 C. P. 497.

Acknowledgment—What sufficient.] "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But, the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple

acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But, if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Per Wigram, V.C., Philips v. Philips*, 3 Hare, 281, 299, 300. This was, in effect, the law laid down in *Tanner v. Smart*, 6 B. & C. 603, which overruled many previous cases. *Accord. Buckmaster v. Russell*, 10 C. B., N. S. 745, *per Williams, J.*; *Chasemore v. Turner*, *infra*. See also *In re River Steamer Co.*, L. R., 6 Ch. 822, 828.

But, the reports still show considerable difference of opinion as to the effect of the words on which the creditor relies for proof of the supposed promise. A mere admission of the debt, without any expressions as to the intention or ability to pay, may be sufficient. See the observations in *Hart v. Prendergast*, 14 M. & W. 741, 742, 746. But, if the admission be so qualified as to show present inability to pay, and only the hope of coming to "some satisfactory arrangement," in event of increased means, it is insufficient, though coupled with a disclaimer of any wish to rely on the statute. *Rackham v. Marriott*, 2 H. & N. 196; 26 L. J., Ex. 315, Ex. Ch.; see *Cassidy v. Firman*, L. R., 1 C. L. 9, Ex. Such expressions in a letter as "you will certainly be repaid;" "wait a little, and all will be right;" amount to a promise, though the letter may also explain the source from which the writer expects to obtain funds: *Collis v. Stack*, 1 H. & N. 805; 26 L. J., Ex. 138. So, "I will try to pay you a little at a time if you will let me; I am sure I am anxious to get out of your debt. I will endeavour to send you a little next week:" *Lee v. Wilmot*, L. R., 1 Ex. 364; and "the old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid;" *Chasemore v. Turner*, L. R., 10 Q. B. 500, Ex. Ch., were held to be sufficient promises. See also *Godwin v. Culley*, 4 H. & N. 373; *Cornforth v. Smithard*, 5 H. & N. 13; 29 L. J., Ex. 228, where Pollock, C.B., intimates that stronger words would be required to re-establish a debt already barred, than to keep alive a debt before it is barred. It has been held that a letter containing a request "to send in your account," is sufficient; *Quincey v. Sharpe*, 1 Ex. D. 72; see also *Banner v. Berridge*, 18 Ch. D. 254; even though coupled with a denial of the correctness of the amount. *Skeet v. Lindsay*, 2 Ex. D. 314; see, however, *Spong v. Wright*, 9 M. & W. 629, *post*, p. 612. And a general admission of some debt being due, coupled with evidence to prove the amount, is sufficient. *Cheslyn v. Dalby*, 4 Y. & C. 238; *Waller v. Lacy*, 1 M. & Gr. 54. But, without such evidence, damages can only be nominal. *Dickinson v. Hatfield*, 1 M. & Rob. 141.

There are many reported cases in which particular letters and other written communications have been held sufficient to prove a promise; but the language in each varies, and is not likely to be exactly repeated in other cases, so that a collection of them is of little use as a guide to the decision of such points when they arise at *Nisi Prius*; nor can any reported cases on this head be relied upon before the case of *Tanner v. Smart*, *supra*. A promise to pay a proportion of a joint debt has been held sufficient to entitle the plaintiff to such proportion, though no sum is specified; the plaintiff may prove the amount by other evidence. *Lechmere v. Fletcher*, 1 Cr. & M. 623; 3 Tyr. 450; *Bird v. Gammon*, 3 N. C. 883. Where a promissory note given to two payees, A. and B., his wife, was barred by the statute, and the maker, after the death of A., indorsed his name and the date on the note, this has been held a sufficient acknowledgment. *Bourdin v. Greenwood*, L. R., 13 Eq. 281.

Acknowledgment—what not sufficient.] A paper admitting the debt, and signed by the defendant on the occasion of an agreement that it should be extinguished by an existing set-off, cannot be used to show a promise to pay; for it did not, in fact, contemplate any future payment at all. *Cripps v. Davis*, 12 M. & W. 159. Where, in answer to a letter from the plaintiff's solicitor, the defendant wrote, "As soon as I am able to attend to my concerns, I will wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between us," Gibbs, C.J., thought it not sufficient to take the case out of the statute. *Craig v. Cox*, Holt, N. P. 380. So where, in answer to a demand for charges relative to the grant of an annuity, the defendant said he thought it had been settled at the time the annuity was granted; that he had been in so much trouble since, that he could not recollect anything about it. *Hellings v. Shaw*, 1 B. Moore, 340; 7 Taunt. 611. So, where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay it now." *Snook v. Mears*, 5 Price, 636. So, where the defendant referred the plaintiff to his attorney, "who was in possession of his determination and ability." *Bicknell v. Keppel*, 1 N. R. 20. Where A. admits a debt due to B. only on the understanding that a cross claim is to be also allowed, and the arrangement goes off, this is no admission by A. to bar the statute. *Francis v. Hawkesley*, 1 E. & E. 1052; 28 L. J., Q. B. 370; *Goate v. Goate*, 1 H. & N. 29. See also *In re River Steamer Co.*, L. R., 6 Ch. 822.

Where the debtor stated in writing that arrangements had been making to enable him to discharge the account, that funds had been appointed of which B. was trustee, to whom he had handed the account, and that B. had authorized him to refer the plaintiff to him; this was held not sufficient to take the case out of the statute; the debtor not charging himself by the acknowledgment. *Whippy v. Hillary*, 3 B. & Ad. 399. So, if the debtor merely refers the creditor to certain funds in the hands of others, and tells him to "pay himself" out of them, this is no promise charging himself. *Routledge v. Ramsay*, 8 Ad. & E. 221.

Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," it was held to be insufficient. *Knott v. Farren*, 4 D. & Ry. 179. "So, I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 D. & Ry. 267. So, where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a 3d. receipt stamp, and I will never pay it;" the acknowledgment was held insufficient. *A'Court v. Cross*, 3 Bing. 329. The following letter from the defendant to plaintiff's attorney was held not sufficient: "Since the receipt of your letter (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith*, 3 M. & W. 402. "Send me your bill, and, if just, I will not give you the trouble of going to law," is not sufficient, as it contains no admission of any debt. *Spong v. Wright*, 9 M. & W. 629; see however, *Quincey v. Sharpe*, 1 Ex. D. 72, and *Skeet v. Lindsay*, 2 Ex. D. 314, *ante*, p. 611. The writing must import an unqualified acknowledgment of a debt, from which a promise may be inferred by the court. *Fearn v. Lewis*, 6 Bing. 349; *Williams v. Griffith*, 3 Exch. 335. And mere general expressions of a hope that the debtor may be in a condition to pay at a future day are not sufficient. *Hart v. Prendergast*, 14 M. & W. 741; *Smith v. Thorne*, 18 Q. B. 134; 21 L. J., Q. B. 199, Ex. Ch.

Where the defendant acknowledges the debt, but insists that it is paid or discharged, the whole of his admission must be taken together, and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt, and will send you a copy of the receipt," but such a copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 Esp. 184; *Anon.*, cited Holt, N. P. 381. Where the acknowledgment was, "You owe me more money; I have a set-off against it," it was held not sufficient. *Swann v. Sowell*, 2 B. & A. 759. "I acknowledge the receipt of the money, but the testatrix gave it me," was also held not sufficient. *Owen v. Wolley*, B. N. P. 148.

Where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument has been admitted to show that it does not operate as a legal discharge. *Partington v. Butcher*, 6 Esp. 66; *Hellings v. Shaw*, 1 B. Moore, 344; 7 Taunt. 608. But, the doctrine is adverted to by the court with expressions of doubt in *Beale v. Nind*, 4 B. & A. 568, and can only be supported on the assumption that such an acknowledgment amounts to a conditional promise.

The following acknowledgment, "I have sent you a note for the money due to you, which your mother left for you," sent with a promissory note, on a receipt stamp, was held insufficient without the promissory note, and that not being properly stamped, could not be looked at. *Parmiter v. Parmiter*, 2 D. F. & J. 526; 30 L. J., Ch. 508.

Where the expressions of the defendant are ambiguous, it was formerly held to be a question of fact for the jury whether they amounted to an acknowledgment of the debt. *Lloyd v. Maunell*, 2 T. R. 760; and see *Linsell v. Bonsor*, 2 N. C. 241. But, this has been questioned in later cases, and it has been since decided that the construction of a doubtful document, given in evidence to defeat the statute, is for the court and not for the jury; though, if intrinsic facts are adduced in explanation, these facts are for the consideration of the jury. *Morrell v. Frith*, 3 M. & W. 402; *Routledge v. Ramsay*, 8 Ad. & E. 221; *Smith v. Thorne*, 18 Q. B. 134; 21 L. J., Q. B. 199, Ex. Ch.

An acknowledgment since action brought is not sufficient. *Bateman v. Pinder*, 3 Q. B. 574, overruling *Yea v. Fouraker*, 2 Burr. 1099.

A. and B. were joint and several makers of a promissory note, and A., having made an assignment for the benefit of his creditors, B. gave to the payee of the note the following memorandum:—"I hereby consent to your receiving the dividend under A.'s assignment, and do agree that your doing so shall not prejudice your claim on me for the same debt." It was held that this was insufficient as against B. *Cockrill v. Sparkes*, 1 H. & C. 699; 32 L. J., Ex. 118. Where there were disputed accounts, and the parties agreed to refer them to an arbitrator "to ascertain the amount due," the amount to be paid "at such times and in such proportions as the arbitrator may appoint;" it was held to be insufficient. *Hales v. Stevenson*, 11 W. R. 33, M. T. 1862, Q. B.; Ex. Ch., 11 W. R. 952, T. T. 1863. In *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17, the claim was for work and labour as an attorney against commissioners under a local improvement act. The commissioners appointed a committee to inquire into the state of their finances, and the committee delivered a signed report, in which the sum claimed was shown to be due to the plaintiff. The commissioners adopted the report, and ordered a rate to be levied in accordance with the recommendation of the committee to defray the sums therein found to be due. This was held not to be sufficient; *Pollock, C. B.*, relying on *Emery v. Day*, 1 C. M. & R. 245, where a somewhat similar acknowledgment was attempted to be set up; but no decision was there

given as to whether or no the acknowledgment was sufficient, because the plaintiff failed to produce it.

Where the defendant had presented a petition for arrangement with his creditors under the 7 & 8 Vict. c. 70, and had inserted in his accounts the debt on which the action was brought, and thereby proposed to assign all his property to trustees "for the future payment or compromise of such debts and engagements," this was held to be insufficient. *Everett v. Robertson*, 1 E. & E. 16; 28 L. J., Q. B. 23. So, the insertion of a debt in the schedule to a deed of inspectorship for administering the estate of the debtor will not take the debt out of the statute, though the schedule be verified by the debtor's oath. *Ex pte. Topping*, 34 L. J., Bk. 44. This case overrules *Eicke v. Nokes*, 1 M. & Rob. 359.

A letter written "without prejudice," cannot be relied on when the terms it proposes have not been accepted. *In re River Steamer Co.*, L. R., 6 Ch. 822; and *vide ante*, p. 60.

Acknowledgment—conditional.] When the promise relied upon is conditional, the plaintiff must show the condition performed; *In re River Steamer Co.*, *supra*; thus, where the defendant promised to pay the debt when he was able, it was ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay. *Davies v. Smith*, 4 Esp. 36; *Beaford v. Saunders*, 2 H. Bl. 116. So, where the promise was, "I cannot pay the debt at present; but I will pay it as soon as I can," it was held necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 B. & C. 603. If the debtor promises to pay the old debt "when he is able," or "by instalments," or "in two years," or out of a certain fund, the creditor can claim nothing more than the new promise gives him. *Per* Wigram, V.C., in *Philips v. Philips*, 3 Hare, 281, 299, *ante*, pp. 610, 611, cited in *Smith v. Thorne*, 18 Q. B. 139; 21 L. J., Q. B. 199, Ex. Ch. See also *Chasmore v. Turner*, L. R., 10 Q. B. 500, Ex. Ch., and *Meyerhoff v. Froehlich*, 3 C. P. D. 333; 4 C. P. D. 63, C. A. And the statute runs from the time of becoming able to pay, though the plaintiff had no notice of the ability, and made no demand. *Waters v. Thanet*, *El. of*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452.

A doubt has existed whether the plaintiff is bound to claim specially on such qualified promise, or can show, under the reply taking issue on the defence of the statute, that the promise has become absolute by the performance of the condition; but it seems to be now settled that the conditional promise may, after performance of the condition, be shown under issue taken on a defence of the statute; *per* Parke, B., in *Hart v. Prendergast*, M. & W. 743, 745; *Smith v. Thorne*, 18 Q. B. 134, 143; 21 L. J., Q. B. 199, 14 Ex. Ch.; and such is the practice, though cases may occur of a promise so qualified as to require a special claim, as to pay in a particular manner.

Whether the promise be qualified or not, is a question of construction for the court and not for the jury, except where extrinsic evidence affects the construction. *Routledge v. Ramsay*, 8 Ad. & E. 221.

Mutual accounts, &c.] Before the 9 Geo. 4, c. 14, it was held that, where there had been mutual current and unsettled accounts between the parties, and any of the items are within six years, such items were evidence (under the replication that the defendant did promise, &c.) as an admission of an open account so as to take the case out of the statute, like any other acknowledgment. *Catling v. Skoulding*, 6 T. R. 189; 2 Wms. Saund. 127 (6). But since that statute, there must be part-payment, or something equivalent to it, or a distinct written acknowledgment, to have this effect. *Williams v*

Griffiths, 2 C. M. & R. 45; *Mills v. Fowkes*, 5 N. C. 455; *Cottam v. Partridge*, 4 M. & Gr. 271. See also as to merchants' accounts, *ante*, p. 602.

Limitation of actions in special cases.] There are certain cases in which the limitation of actions is governed by special acts. The following are some of these. Thus, the stat. 35 Geo. 3, c. 125, ss. 7, 8, 9, prescribes the formalities required before a debt becomes recoverable from an heir-apparent to the crown, who has a separate establishment, and limits the period for its recovery.

The Highway Act (5 & 6 Will. 4, c. 50), s. 109, provides that no action shall be commenced against any person for anything done in pursuance of, or under the authority of the act, after three calendar months, next after the fact committed, for which such action shall be brought. This section applies to the recovery of money *bond fide* received by the defendants from the plaintiffs as surveyors of highways, but under an illegal rate. See *Selmes v. Judge*, L. R., 6 Q. B. 724. So the Public Health Act, 1875, s. 264, which is somewhat similar in terms, and limits the period of action to 6 months, applies to an action for money paid to a local board, under a mistake of fact. *Midland Ry. Co. v. Withington Local Board*, 11 Q. B. D. 788, C.A. See further *post*, Part III., *Actions against constables, officers, &c.*

The stat. 22 & 23 Vict. c. 49, s. 1, imposes a limitation in the case of actions for debts contracted by Poor Law Boards. See *R. v. Stepney Union, Guardians of*, L. R., 9 Q. B. 383.

Merger.

Where a debtor gives his creditor a higher security for the debt due, and co-extensive with it, the debt is merged by operation of law, irrespectively of the intention of the parties. *Price v. Moulton*, 10 C. B. 561; 20 L. J., C. P. 102. But, if the security so given is not co-extensive with the debt, the latter will exist as a collateral security, and there will be no merger. *Holmes v. Bell*, 3 M. & Gr. 213; *Bell v. Banks*, *Id.* 258; *Norfolk Ry. Co. v. M'Namara*, 3 Exch. 628; *Ansell v. Baker*, 15 Q. B. 20; *Boaler v. Mayor*, 19 C. B., N. S. 76; 34 L. J., C. P. 230.

If a bond be given for rent due, even on a parol demise, this does not operate as a merger, for rent is a debt of equal degree with a debt by specialty. *Newport v. Godfrey*, 2 Vent. 184; 3 Lev. 267; 4 Mod. 44; *Gage v. Acton*, 1 Salk. 325; *Davis v. Gyde*, 2 Ad. & E. 623; 1 Roll. Abr. Dett, (Extinguishment), A. pl. 2, p. 605, l. 1.

See further as to merger, *ante*, pp. 535, 536.

Payment.

Payment must be specially pleaded. Rules, 1883, O. xix., r. 15, *ante*, p. 283; and without a defence of payment, it cannot be given in evidence, though only for the purpose of showing that interest is not due on the debt demanded, the debt itself being admitted by payment into court. *Adams v. Palk*, 3 Q. B. 2.

Payment cannot be shown under a set-off; *Linley v. Polden*, 3 Dowl. 780; and see *Lewis v. Samuel*, 8 Q. B. 685. It is, however, sometimes difficult to say whether a receipt or retainer of money by a creditor amounts to a payment or a set-off; see *Thomas v. Cross*, 7 Exch. 728; 21 L. J. Ex. 251. But, probably, if the effect of the transaction were wrongly stated, a judge would amend in such a case. In an action against one of two joint and several guarantors, the reduction of the defendant's liability by the

payment by the other guarantor of part of the amount, cannot be set up without a defence of payment pleaded. *Laurie v. Scholefield*, L. R., 4 C. P. 622. In this case the court allowed the plea to be added upon terms.

It is difficult to understand the reasoning upon which the decision in one case, and an alleged dictum in another is founded that, where goods are sold for ready money, and the delivery in exchange for money takes place immediately, no debt arises, and that consequently, in an action for goods sold and delivered, in such a case it was not necessary to plead payment, but that the nature of the transaction might be shown under the plea of never indebted. Of course, if this view be taken of the transaction, there is, strictly speaking, no payment, for when there is no debt there can be no payment. But it is scarcely possible to suppose a case of exchange of goods for money, which is not preceded by a prior offer and acceptance, and it is upon the contract thus made, and which the defence of payment confesses and avoids, that the action is brought. The ruling in *Bussey v. Barnett*, 9 M. & W. 312, which is usually relied on for the doctrine under discussion, seems to be contrary to the opinion of Parke, B., in *Goodchild v. Pledge*, 1 M. & W. 363. It was also disputed in *Littlechild v. Banks*, 7 Q. B. 739; and in *Smith v. Winter*, 12 C. B. 487; 21 L. J., C. P. 158, was said to have gone to "the very verge of the law." In *Timmins v. Gibbins*, 18 Q. B. 726; 21 L. J., Q. B. 403, Ld. Campbell said, that "where money is paid over the counter at the time of sale, there must be a moment of time when the purchaser is indebted to the vendor." It is said, however, that a similar opinion was again expressed by the court in *Wood v. Bleicher*, 4 W. R. 566, E. T. 1856, Ex. In *Smith v. Winter*, *supra*, in debt for work and labour, it was held that where work was to be done by a debtor for his creditor, as a set-off against the debt, that in an action for work and labour this might be shown under the general issue. But, this is obviously an entirely different case.

An account stated between plaintiff and defendant, and payment of the balance, is evidence under a defence of payment, though it may be specially pleaded according to the facts. *Callander v. Howard*, 10 C. B. 290; 19 L. J., C. P. 312.

Where, in answer to a claim for 10*l.* 13*s.* 4*d.*, the defendant sent a bank bill for 10*l.*, which the plaintiff said he should not accept in discharge of his claim, but nevertheless retained, it was held that there was evidence of payment. *Caine v. Coulton*, 1 H. & C. 764; 32 L. J. Ex. 97.

Where the plaintiff's particulars admit a payment, he can recover only the amount by which his claims, as proved, exceed the payment as alleged. *Rowland v. Blaksley*, 1 Q. B. 403; see also *Price v. Nees*, 11 M. & W. 576. And if it gives credit thus, "Cr.—by bills of exchange, 1,500*l.*," this will be taken to be a payment by the defendant, and the plaintiff cannot show that it was a payment by another person, for which the defendant is not entitled to credit. *Smethurst v. Taylor*, 12 M. & W. 545. But, the plaintiff may explain that the payment, for which the particulars give credit, was not made on account of the balance he claims. *Mercy v. Galot*, 3 Exch. 851. In this case the plaintiff seems to have included in the particulars items which he could not have recovered, but which had been paid by the defendant. In another case, the particulars claimed a balance of 29*l.* for goods sold, and gave credit for 920*l.* paid; the plaintiff proved a claim of 949*l.* for goods sold; it appeared that 84*l.* worth of the goods had been taken back, and defendant insisted at the trial that this sum, added to the sum credited, left nothing for the plaintiff to recover: held, that the plaintiff might turn the balance in his favour by showing that he had given credit for 84*l.* as part of the payment. *Lamb v. Micklethwait*, 1 Q. B. 400. Where credit is given for a sum paid, whether before or after action, a

defence of payment applies only to the *balance*, and proof of payment of that amount is sufficient. *Eastwick v. Harman*, 6 M. & W. 13. Where the plaintiff proceeded in his particulars for a "balance" of 37*l.*, and the particulars stated sales to the amount of 100*l.*, and gave no credit for specific payments, and the defendant pleaded and proved a set-off of 5*l.*, with other pleas, it was held that the defendant was not necessarily entitled to deduct the set-off from 37*l.*; but the jury might find that sum to be the "balance" after deducting the 5*l.* *Townson v. Jackson*, 13 M. & W. 375.

Where a creditor directs his debtor to transmit money or a bill in payment by the post, and it is lost (without default of the debtor), the creditor must bear the loss; *Warwicke v. Noakes*, 1 Peake, 98; and where no directions are given about the mode of remittance, yet if this be done in the usual way of business between the parties, it seems that the debtor is discharged. *Id.*, per Ld. Kenyon, C. J.; *vide post*, pp. 621, *et seq.*

As to payment of bills or notes, see *ante*, pp. 367, *et seq.*

A usual way of proving payment is by the production of a receipt signed by the plaintiff or his agent. *Vide Admissions; Receipts; ante*, p. 63; and *Stamps, ante*, p. 251.

As to proof of payment of legacies, see *Stamps, ante*, p. 252.

Payment to agent.] Payment to an authorized agent is sufficient. *Goodland v. Blewith*, 1 Camp. 477; *Coates v. Leves*, *Id.* 444; *Owen v. Barrow*, 1 N. R. 101. Thus, payment to the solicitor, while an action is subsisting, is good; *Anon.*, 1 Dowl. 173; but not to his clerk, who shows no other authority than his master's order to receive it; per Ld. Kenyon, C. J., *Coore v. Callaway*, 1 Esp. 115. The solicitor's authority to receive seems to continue as long as the retainer; and this is presumed to continue after judgment until payment, voluntarily, or under execution. *Bevins v. Hulme*, 15 M. & W. 88, 96. Payment to the solicitor's agent in the country is not good. *Yates v. Freckleton*, 2 Doug. 623. But payment to a person found in a merchant's counting-house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, though the person was, in fact, not employed by him; *Barrett v. Deere*, M. & M. 200; and see *Wilmott v. Smith*, *Id.* 238. But, this is on the assumption that the payment relates to the merchant's business; for if it be payment in respect of a private debt due to him, as a mortgage debt, or a legacy, it will not be sufficient. *Sanderson v. Bell*, 2 Cr. & M. 304, 313. So, if a shopman, authorized to receive cash over the counter, obtains payment elsewhere in another way, and does not pay over the amount to his principal, this is not a discharge. *Kaye v. Brett*, 5 Exch. 269. An agent employed to sell land has no authority, as such, to receive payment. *Mynn v. Joliffe*, 1 M. & Rob. 326. So, an auctioneer, though he is authorized to receive the deposit, has no general authority to receive the purchase money; *Sykes v. Giles*, 5 M. & W. 645; and, generally, an agent for taking a bond, or for negotiating, or concluding a contract, has no implied authority to receive money due under it. *Story on Agency*, s. 98. Even the possession of the instrument, as the possession by the agent, of a conveyance to secure a loan of money negotiated by the agent, is no authority to receive the principal, although the creditor may have sometimes permitted the agent to receive interest. *Wilkinson v. Candlish*, 5 Exch. 91. So, possession of an executed conveyance, with a receipt indorsed by vendor or mortgagor, was no sufficient authority to the solicitor of vendor or mortgagor to receive the purchase-money or loan. *Viney v. Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; *Ex parte Swinbanks*, 11 Ch. D. 525, C. A. This is now otherwise under the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 56. The effect of this section is however only to dispense with the necessity for

a written authority from the vendor, to pay the money to the solicitor, and does not apply to those cases in which the authority could not be given. *In re Bellamy and Metrop. Board of Works*, 24 Ch. D. 386, C. A., *diss.* Baggallay, L.J. Possession of a negotiable security is evidence of authority to receive payment. Story on Agency, s. 104, citing *Owen v. Barrow*, 1 N. R. 103. See further, as to payment of a bill of exchange, cheque, or promissory note, the Bills of Exchange Act, 1882, s. 59, *ante*, p. 367. Payment to the factor who sold the goods, and who was known to sell as such, is good against the principal, though made prematurely. *Fish v. Kempton*, 7 C. B. 687. A special defence of payment to agent D., of whom the plaintiff bought the goods, believing him to be the principal, must state that D. was ostensible owner of the goods by permission of the plaintiff. *Drakeford v. Piercy*, 7 B. & S. 515.

As a general rule, when a person employs an agent to receive a debt he must receive it in money, and if the agent sets it off against a debt from himself, the creditor cannot rely on this as payment. *Barker v. Greenwood*, 2 Y. & C., Ex. 418; *Scott v. Irving*, 1 B. & Ad. 605; *Sweeting v. Pearce*, 7 C. B., N. S. 449; 29 L. J., C. P. 265; 9 C. B., N. S. 534; 30 L. J., C. P. 109, Ex. Ch.; *Pearson v. Scott*, 9 Ch. D. 198; though if the principal knew that there was a general usage of the trade or market, in which the transaction took place, that debts should be set off in this way, and he did not object to it, he would be taken to be bound by the usage. *Stewart v. Aberdeen*, 4 M. & W. 211, cited *ante*, p. 407, and *Sweeting v. Pearce*, *supra*. So, where goods are bought through a broker, and the purchaser pays for them by an advance on his general account with the broker, before the delivery of the goods, it is a question for the jury whether by the custom of the trade such payment is good as against the principal. *Catterall v. Hindle*, L. R., 2 C. P. 368, Ex. Ch. So, payment to a clerk or servant by cheque, bill, or note, is good, if it be in the usual course of business; *Thorold v. Smith*, 11 Mod. 87, 88; or, if the cheque, &c., is subsequently paid; *Bridges v. Garrett*, L. R. 5 C. P. 456, Ex. Ch., *per* Blackburn, J.; and see *Williams v. Evans*, L. R., 1 Q. B. 352, 354: even though the payment was by cheque payable to order, which the clerk cashed at the bankers by forging the indorsement; for the payment by the banker is protected by 16 & 17 Vict. c. 59, s. 19, and Bills of Exchange Act, 1882, s. 60, *ante*, p. 371. *Charles v. Blackwell*, 2 C. P. D. 151, C. A. The defendant having purchased copyhold land was admitted by his solicitor C., who had been appointed by the steward of the manor as his deputy to admit the defendant. The defendant gave C. a cheque, crossed by C.'s request, to C.'s bankers, for the amount of the lord's fine, steward's fees, and C.'s charges as his solicitor. The amount of the cheque was duly paid to C.'s bankers, who retained the money in discharge of a debt due to them by C. It was held a good payment of the fine by the defendant as against the lord. *Bridges v. Garrett*, L. R., 5 C. P. 451, Ex. Ch. But, payment to a particular agent, *e.g.*, an auctioneer, must not be made by bill. *Williams v. Evans*, *supra*; and see *Sykes v. Giles*, 5 M. & W. 645. As to the form in which a bill given to an agent should be drawn, see *Hogarth v. Wherley*, L. R., 10 C. P. 630.

A payment to one of several persons who have deposited money in a bank, and who are not partners, is not good as against the others. *Innes v. Stephenson*, 1 M. & Rob. 145; *Stewart v. Lee*, M. & M. 158. But, a payment to one partner is payment to all; and a receipt by one, is *prima facie* evidence of payment against all; but it may be rebutted by proof that it was given in fraud of the other partners in order to defeat the action. *Farrar v. Hutchinson*, 9 Ad. & E. 641.

Payment by agent.] Payment by an agent will support an averment of

payment by the principal, though the latter has not in fact repaid the agent. *Adams v. Dansey*, 6 Bing. 506.

Payment by one of several partners is payment by all ; but where one of several partners paid a sum of money to a creditor, in consideration that the creditor would assign the debt to a trustee for the partner, it was held that, in an action brought by the trustee, in the name of the creditor, against the partnership, the above facts did not support a plea of payment. *M'Intyre v. Miller*, 13 M. & W. 725. Where it was agreed between A., B., and C., that A. should advance money to B. in anticipation of money of B. that was coming into A.'s hands, and on receiving in the meantime the security of C.'s acceptance, which was to be satisfied out of such money ; it was held that, on receipt of B.'s money by A., it might be relied on by C. as payment by him, in an action against him by A. on the acceptance. *Hills v. Mesnard*, 10 Q. B. 266. In an action against the surety of A., a bankrupt, there was a plea of payment by A., and acceptance in satisfaction by the plaintiff : held, on issue taken on the plea, that a payment by A. to the plaintiff, which was recovered back by A.'s assignees as a fraudulent preference, would not support the plea, and that the verdict and judgment of the assignees was evidence, but not conclusive, for the plaintiff to show that the payment was illusory. *Pritchard v. Hitchcock*, 6 M. & Gr. 151. See also *Petty v. Cooke*, L. R., 6 Q. B. 790.

Payment by a third person, if made on behalf of the defendant, accepted by the plaintiff, and adopted by the defendant, is a good defence. *Simpson v. Eggington*, 10 Exch. 845 ; 24 L. J., Ex. 312 ; *Belshaw v. Bush*, 11 C. B. 191 ; 22 L. J., C. P. 24 ; *Kemp v. Balls*, 10 Exch. 607 ; 24 L. J., Ex. 47. But, where payment is made by an unauthorized agent, the creditor and agent may, before the debtor has affirmed the payment, rescind the transaction, and the creditor repay the money, and the payment is then at an end ; *Walter v. James*, L. R., 6 Ex. 124. So, payment by a third person, without the debtor's knowledge, and not on behalf of the defendant, but as an advance for the creditor's convenience, is no payment, though pleaded as such by defendant. *Lucas v. Wilkinson*, 1 H. & N. 420 ; 26 L. J., Ex. 13.

Appropriation of Payments.] In general, the party who pays money has a right to direct the application of it ; but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to whichever of those demands he pleases. *Hall v. Wood*, 14 East, 243, n. ; *Clayton's case*, 1 Mer. 572.

The appropriation by the debtor need not be express ; it may be inferred from conduct or circumstances indicating his intention. S. C. ; *Newmarch v. Clay*, 14 East, 239. The intention of the debtor ought to be notified at or before the time of payment. *Mayfield v. Wadsley*, 3 B. & C. 357. But, the creditor need not apply it to any particular demand at the moment of payment ; he has a right to make the application at any subsequent period ; nor will an entry in his private books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham*, 2 B. & C. 65 ; see also *Grigg v. Cocks*, 4 Sim. 438. The creditor, in such cases, might, even before the Judicature Acts, have applied the payment to the discharge of a prior and purely equitable demand, and have sued his debtor at law for the subsequent legal debt. *Bosanquet v. Wray*, 6 Taunt. 597. But, this could only be done if the equitable debt were of agreed and ascertained amount ; for it was not competent for the creditor to apply it in satisfaction of some equitable demand, the amount of which could only be ascertained by an account in equity or

general settlement of partnership. *Goddard v. Hodges*, 1 Cr. & M. 33. It seems, however, that the Judicature Acts have now abolished the distinction between a legal and an equitable demand, though in some cases it cannot be ascertained if the latter exists until an account has been taken. The creditor may apply it to a debt barred by the Statute of Limitations; though we have seen that part payment, so appropriated by the payee only, will not *per se* take the whole debt out of the statute. *Mills v. Fowkes*, 5 N. C. 455. See *ante*, pp. 607, 608. Where the party paying is indebted to the party receiving for a sum due from his wife, *dum sola*, and also on another demand, the party, receiving may apply the money to the first demand. *Goddard v. Cox*, 2 Str. 1194.

In some instances, and in the absence of any proof of special appropriation, the law will direct or presume the application of money paid generally. Of this nature are accounts current with bankers and others, where there are various items of debt on one side and credit on the other, occurring at different times, and no special appropriation is made by the parties; successive payments will then be applied to the discharge of antecedent debts in the order of time in which they stand. Story, Eq. Jurisp. § 459, *b.*; *Kinnaird v. Webster*, 10 Ch. D. 139. Such cases stand on the presumed intention of the debtor, or of both parties, arising out of the nature of the dealings between them. Thus, where one of several partners dies while the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, who joins the transactions of the old and new firm in one entire account, the payments made from time to time by the surviving partners will be applied to the old debts; *per Bayley, J.*, *Simson v. Ingham*, 2 B. & C. 72; *Clayton's case*, 1 Mer. 572; *Brooke v. Enderby*, 2 B. & B. 71; *Hooper v. Keay*, 1 Q. B. D. 178; *Accord. L. & County Bank v. Ratcliffe*, 6 Ap. Ca. 722, D. P. So, payments by a debtor, from time to time, to surviving partners, upon one general account, including an old debt due to the former firm, will be applied in the first place to such old debt. *Bodenham v. Purchas*, 2 B. & A. 39. But, where the old debts are not brought into the new account, general payments on the account are not to be considered as made in discharge of an old debt. *Simson v. Ingham*, 2 B. & C. 65. When the circumstances rebut the presumption as to the intention of the debtor the rule above laid down as to appropriation of payments will not apply. Thus where a person in a fiduciary capacity, though not strictly a trustee, draws out, for his own private purposes, sums from a mixed fund of his own and of trustee moneys, it is presumed that he draws out his own moneys only, as otherwise he would commit a fraud. *Knatchbull v. Hallett*, 13 Ch. D. 696, C. A., *diss.* Thesiger, L. J. Where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown*, M. & M. 40. Where goods are from time to time supplied to a mining company, conducted on the cost-book principle, and a payment is made on account of these goods to the seller generally, he is entitled to apply these payments in satisfaction of items of his claim, which accrued due before a fresh partner entered the firm, although the payment was made after that event. *Geake v. Jackson*, 36 L. J., C. P. 108.

In the absence of special application by either party, there is no rule by which a general payment is applied on any principle, grounded on the comparative burden of different debts, or with reference to the interest of the debtor or of his sureties. *Mills v. Fowkes*, *supra*. Thus the law will not, in favour of a surety, direct the application of money, paid generally, to the discharge of the debt secured, without some circumstances to show that it was so intended; *Plomer v. Long*, 1 Stark. 153; *Williams v. Rawlinson*, 3

Bing. 71 ; and where a surety joined in a money bond to secure advances by a bank to his principal, and it appears that the security was intended, though not expressed, to be a continuing one, payments will not be applied to the extinction of the bond in preference to later debts. *Henniker v. Wigg*, 4 Q. B. 792 ; *City Discount Co. v. McLean*, L. R., 9 C. P. 692, Ex. Ch. The case of *Marryatts v. White*, 2 Stark. 101, occasionally cited in proof of the doctrine that payment will be applied in favour of sureties, is one in which the evidence tended to show that the payments were, *in fact*, made by the debtor in relief of the surety, and not on account of an earlier debt, to which creditor claimed to apply it. See also *Kinnaird v. Webster*, 10 Ch. D. 139. The surety, on a promissory note given to secure a loan to a member of a money club, cannot rely on the monthly subscriptions and premiums paid by his principal, as payments in reduction of his liability on the note. *Wright v. Hickling*, L. R., 2 C. P. 199.

When A. has a demand against B.'s wife as executrix, and also another demand against B. in his own right, and B. makes a general payment, A. cannot apply it to the former demand ; for the obligation to pay it depends on whether or no there are assets. *Goddard v. Cox*, 2 Str. 1194. Where there are two demands, one legal and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand. *Wright v. Laing*, 3 B. & C. 165. But, the party receiving money may himself apply it to a demand for spirituous liquors supplied in quantities not amounting to 20s. at a time, for the stat. 24 Geo. 2, c. 40, *ante*, p. 595, only prevents the seller from maintaining an action therefor. *Cruickshanks v. Rose*, 1 M. & Rob. 100, *cor. Ld. Tenterden*, C. J. And in such a case, the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand : and he may make the appropriation at any time before the matter comes before the jury. *Philpott v. Jones*, 2 Ad. & E. 41. The same principle would seem to apply to a demand for beer, &c., falling within the provisions of the County Courts Act, 1867, (30 & 31 Vict. c. 142), s. 4, *ante*, p. 596.

Payment by a bill or note.] If a bill or note payable to bearer is delivered without indorsement, a distinction has been drawn between the cases in which it has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks. *Fenn v. Harrison*, 3 T. R. 757, 759 ; *Ex pte. Shuttleworth*, 3 Ves. 368 ; *Camidge v. Allenby*, 6 B. & C. 373, 381. But, when the security is delivered in payment of a pre-existing debt, the delivery does not operate as payment, unless the transferee make the security his own by laches (as to which *vide post*, pp. 622, 623) ; *Ward v. Evans*, 2 Ld. Raym. 928 ; *Camidge v. Allenby*, *supra*. Bank notes, other than those of the bank of England, seem to fall within this rule. S. CC. ; *Moore v. Warren*, 1 Str. 415 ; *Turner v. Stones*, 1 D. & L. 122 ; *Robson v. Olliver*, 10 Q. B. 704 ; *Timmins v. Gibbins*, 18 Q. B. 722 ; 21 L. J., Q. B. 403 ; *Lichfield Union v. Greene*, 1 H. & N. 884 ; 26 L. J., Ex. 140 ; see Byles on Bills, 12th ed., pp. 159, *et seq.* ; Chitty on Bills, 11th ed., pp. 369, 370.

The legal effect of accepting, on account of a debt, a bill, or note, not treated as cash, is that of a conditional payment. It implies an agreement to suspend the remedy on the original demand during the currency of the bill or note ; *Griffiths v. Owen*, 13 M. & W. 58, 64 ; *Belshaw v. Bush*, *infra* ; except in the case of specialty debts, or rent, in which last cases no such implication is held to arise ; *Davis v. Gyde*, 2 Ad. & E. 623 ; *Worthington v. Wigley*, 3 N. C. 454 ; *Belshaw v. Bush*, 11 C. B. 191, 204 ; 22 L. J., C. P. 24, 29 ; *Bramwell v. Eglinton*, 5 B. & S. 39 ; 33 L. J., Q. B. 130. A bill

given by a stranger and received by the creditor on account of the debt has the same effect as one given by the debtor, if such payment be adopted by him. *Belshaw v. Bush*, ante, p. 621; *Constable v. Andrew*, 2 Cr. & M. 298. Taking a bill "for and on account, and in payment of the price," is not a satisfaction of the debt, but only a conditional payment. *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 28 L. J., C. P. 119; *Keay v. Fenwick*, 1 C. P. D. 745, C. A. Where a purchaser gives the seller an order upon a third person entitling him to receive cash, instead of which the vendor elects to take a bill, in such case, though the bill is dishonoured, the purchaser is discharged. *Vernon v. Boverie*, 2 Show. 296; *Smith v. Ferrand*, 7 B. & C. 19. But, it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a cheque which is dishonoured. *Everett v. Collins*, 2 Camp. 513. Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was dishonoured, it was held by Gibbs, C.J., that the freighter was not thereby discharged. *Marsh v. Pedder*, 4 Camp. 257.

There may be some difficulty in saying precisely what is the duty of a creditor to whom a cheque is sent by his debtor in discharge of the debt. The question is, whether the debtor has the right to throw on his creditor the burden of accepting the cheque as payment, or sending it back, and this would in some cases depend on the usages of trade and the previous dealings between the parties. If there were no such right, then the sending the cheque would go for nothing; if there were any such right, then the creditor, by retaining the cheque, might reasonably be presumed to have accepted it in discharge of the debt. The whole is a question of fact, which is, perhaps, best left to the decision of the jury; see *Pearce v. Davis*, 1 M. & Rob. 365; *Boswell v. Smith*, 6 C. & P. 60; *Hough v. May*, 4 Ad. & E. 954. *Vide ante*, p. 617.

Proof that bills have been given for a debt (and *qy.* that the bills are due) is *prima facie* evidence of payment, without showing that such bills were in fact paid, and it is for the plaintiff in an action for goods sold to show that they have been dishonoured. *Hebden v. Hartsink*, 4 Esp. 46; *Stedman v. Gooch*, 1 Esp. 4. So, if a cheque be received as cash, this is evidence of payment at the time it was so received without showing that it was subsequently honoured. *Carmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co.*, L. R., 8 C. P. 685, cited *ante*, p. 529. The vendor of goods received an acceptance of the vendee, and returned it with a request to make it payable at a banker's; but the vendee kept the bill; it was held that there was no defence to an action for goods sold. *Widders v. Gorton*, 1 C. B., N. S. 576; 26 L. J., C. P. 165.

By the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 50, (replacing the Crossed Cheques Act, 1876, 39 & 40 Vict. c. 81, s. 9), cited *ante*, p. 374, "where the banker on whom a crossed cheque is drawn in good faith and without negligence pays it if crossed *generally*, to a banker, and if crossed *specially*, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque and, if the cheque has come to the hands of the payee, the drawer, shall respectively be entitled to the same rights, and be placed in the same position, as if payment of the cheque had been made to the true owner thereof."

Where a negotiable bill or note has been received by the creditor and afterwards lost, this is an answer to an action on the original consideration. *Crowe v. Clay*, 9 Exch. 604; 23 L. J., Ex. 150, Ex. Ch. See also the cases, *ante*, pp. 324, 325, and *Charles v. Blackwell*, 2 C. P. D. 151, C. A., *ante*, p. 618.

If the value of the security be diminished by the creditor's laches or misconduct, it is made his own, and operates as payment of the debt. *Alderson v. Langdale*, 3 B. & Ad. 660, 663; *Camidge v. Allenby*, *Lichfield Union*

v. Greene, ante, p. 621. A vendor took from his vendee, as collateral security, a bill accepted by a third person, indorsed by the drawer and payee to the vendee; the bill was dishonoured, but no notice thereof was given by the vendor; it was held, in an action for goods sold, that the laches of the plaintiff operated so as to make the bill payment *pro tanto*. *Peacock v. Purcell*, 14 C. R., N. S. 728; 32 L. J., C. P. 266. See also *Yglesias v. River Plate Bank*, 3 C. P. D. 60, 330, C. A. So, a creditor who takes from his debtor's agent on account of the debt, the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fail to do so, and by his delay alter for the worse the position of the debtor, the debtor is discharged, although the latter was not a party to the cheque. *Hopkins v. Ware*, L. R., 4 Ex. 268. See also *Smith v. Mercer*, L. R., 3 Ex. 51. *Pearse's Claim*, L. R., 8 Eq. 506, decided by Stuart, V. C., is hardly reconcilable with these cases. The defendant gave the plaintiff a cheque on his bankers in payment of a claim, and the cheque was duly presented by post by the plaintiff's bankers to the defendant's bankers, who neither remitted the amount nor returned the cheque till after their stoppage: it was held that there was no payment. *Heywood v. Pickering*, L. R., 9 Q. B. 428.

Other kinds of payment.] A payment may be made by the mere transfer of figures in an account without any money passing. *Eyles v. Ellis*, 4 Bing. 112; *Bodenham v. Purchas*, 2 B. & A. 39.

In an action on a bill of exchange the defendant pleaded payment. It appeared that the plaintiff had sold shares for A. on credit, but that A., being in the want of money, obtained an advance from the plaintiff of the amount due for the shares, the defendant giving his acceptance also for the amount as further security; but it was agreed between the plaintiff and defendant and A. that the plaintiff should apply the proceeds of the sale of the shares, when paid, in payment of the bill. The plaintiff received the proceeds: it was held that these facts constituted payment. *Hills v. Mesnard*, 10 Q. B. 266.

If a debtor pays a sum of money to a third person, by direction or with the assent of his creditor, in discharge of a liability of the creditor, it is the same as if the money were paid into the creditor's own hands. *Waller v. Andrews*, 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11; Chit. Contr. 10th ed. 684.

If goods be accepted in satisfaction of a debt this constitutes payment. *Cannan v. Wood*, 2 M. & W. 465; *Hooper v. Stephens*, 4 Ad. & E. 71. In neither of these cases did the question arise upon a plea of payment, but it seems that giving goods in satisfaction might be proved under that defence.

Release.

A release must be specially pleaded, Rules, 1883, O. xix., r. 15, ante, p. 283; and the evidence depends on the reply. After breach, a contract can only be discharged by a release under seal, or by accord and satisfaction; but before breach it may be discharged by parol. Ante, p. 28. The defence should state specifically that the release was by deed, otherwise it would be supported by proof of a parol discharge. *Harris v. Goodwyn*, 2 M. & Gr. 405. See, however, *Thames Haven Dock v. Brymer*, 5 Exch. 696, 711, 712; which has been recently followed by *Young v. Austen*, L. R., 4 C. P. 553; and *Abrey v. Crux*, L. R., 5 C. P. 37, cited ante, p. 366.

As to proof of deed, *vide ante*, pp. 123, *et seq.*, and *post*, p. 636.

As to effect of cancelled deed, *vide post*, p. 636.

As to effect of alteration of deed, *vide ante*, pp. 588, *et seq.*

Where there were cross debts, and the plaintiff sued for the whole of his

debt, and defendant pleaded a release of the whole, it appeared that plaintiff had signed a composition deed releasing the defendant from any debts owing to the plaintiff; the deed left the amount of debt released, in blank; and the blank had, after execution, but without the plaintiff's authority, been filled up with the whole amount of the debt sued for; held that, on a finding by the jury that the debt meant to be released was the difference between the plaintiff's debt and a set-off of less amount, the plaintiff was entitled to a verdict on the issue of *non est factum* replied to the release. *Pazakerly v. McKnight*, 6 E. & B. 795; 26 L. J., Q. B. 30. *Semb.* the defendant should have pleaded the set-off and a release of the difference. See Bullen and Leake on Pleading, 3rd ed. 671.

A release of one of two joint, or joint and several, debtors, is a discharge of all. *Nicholson v. Revill*, 4 Ad. & E. 675. But although a release of the whole debt, given to one of two joint, or joint and several, contractors, ensures to the benefit of both, yet receiving a portion of a debt and putting an end to an action against one of them, is not a release of the other. *Watters v. Smith*, 2 B. & Ad. 889. And a release to one of several contractors if qualified,—as a release, reserving the right to join the releasee in a suit for the purpose of recovering against the others,—is not pleadable as a release of all. *Solly v. Forbes*, 2 B. & B. 38. So, a release of one co-debtor reserving remedies against the other; *Willis v. De Castro*, 4 C. B., N. S. 216; 27 L. J., C. P. 243; or a release of the principal debtor, reserving rights against a surety; *Kearsley v. Cole*, 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 760; 24 L. J., Q. B. 130; *Green v. Wynn*, L. R., 4 Ch. 204; *Bateson v. Gosling*, L. R., 7 C. P. 9; amount only to a covenant not to sue, and not to a release, and are not pleadable by the co-debtor. So, where the original contract reserves to the creditor the right of giving a release to the principal debtor, without discharging the surety, a release granted to the debtor is not pleadable by the surety. *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J., Ex. 133. But, where the right is not reserved in the original contract or release itself, oral evidence of the reservation cannot be given. *Cocks v. Nash*, 9 Bing. 341. See further, *ante*, p. 435.

An unqualified covenant not to sue has the effect of a release on the ground of avoiding circuity of action; 2 Wms. Saund. 47 *gg*; *Id.* 150, (2); *Ford v. Beech*, 11 Q. B. 853; but, a covenant by one of several joint creditors not to sue the defendant, is not pleadable as a release, to an action by all. *Walmsley v. Cooper*, 11 Ad. & E. 216. And, a covenant not to sue for a certain time was at law inoperative as a bar. 2 Wms. Saund. 47 *gg*, 48; *Id.* 150, (2); *Thimbleby v. Barron*, 3 M. & W. 310; *Ford v. Beech*, *supra*. If, however, such a covenant is founded on valuable consideration, it would seem that, on equitable principles, it would now form a bar to an action brought within the time. And it was so, even at common law, if there were a proviso that it should be pleadable in bar to any action brought within the time. *Gibbons v. Vouillon*, 8 C. B. 483; *Walker v. Nevill*, 3 H. & C. 403; 34 L. J., Ex. 73; *Cornor v. Sweet*, L. R., 1 C. P. 456.

The discharge in bankruptcy of A. does "not release any person, who at the date of the receiving order, was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him, or any person who was surety, or in the nature of a surety for him;" Bankruptcy Act, 1883, s. 30 (4). And "the acceptance by a creditor, of a composition or scheme, shall not release any person who, under this act, would not be released by an order of discharge, if the debtor had been adjudged bankrupt;" sect. 18 (15). So in the case of a joint and several liability, a composition accepted by the joint creditors does not affect the several liability. *Simpson v. Henning*, L. R., 10 Q. B. 406, Ex. Ch.

Fraud practised on the releasor must be replied, if relied upon. *Wild v. Williams*, 6 M. & W. 490; and where the clerk of the defendant's attorney procured a cunningly-worded release from an illiterate plaintiff, this was held evidence of fraud. *Sargent v. Wedlake*, 11 C. B. 732. As to fraud, *vide ante*, p. 590.

Fraud can only be relied on in reply to a release, contained in a contract, when the plaintiff can disaffirm the contract, and remit the defendant to his former state. *Urquhart v. Macpherson*, 3 Ap. Ca. 821, P. C.

Rescission.

Before breach a simple contract may be rescinded and discharged by a mutual oral agreement. *Milton v. Edgeworth*, 6 Bro. P. C. 587, and see cases, *ante*, p. 28. To a declaration on a general breach of contract to deliver goods weekly for a year, it was pleaded that the contract was rescinded before breach. It was held that if there was a single breach before rescission, the plea failed *in toto*. *Burgess v. De Lane*, 27 L. J., Ex. 154.

Where there is an agreement good under the Statute of Frauds, an invalid oral agreement to vary the terms does not operate by way of rescission of the original agreement. *Noble v. Ward*, L. R., 2 Ex. 135, Ex. Ch.

The defence is sometimes pleaded in the form of exoneration and discharge, but the defendant must prove a proposition to exonerate on the part of the plaintiff, acceded to by himself, which is to effect a rescinding of the contract previously made. *King v. Gillett*, 7 M. & W. 55, 59.

As to rescission of contract of marriage, see *Davis v. Bomford*, 6 H. & N. 245; 20 L. J., Ex. 139, cited *ante*, p. 446.

Set-off and Counter-claim.

The plea of set-off was first given by 2 Geo. 2, c. 22, s. 13, & 8 Geo. 2, c. 24, ss. 4, 5, which enabled mutual debts to be set off between the plaintiff and the defendant; this right is now very much extended, for, by Rules 1883, O. xix., r. 3, "A defendant in an action may set off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." By O. xxi., r. 10, "Where any defendant seeks to rely upon any grounds, as supporting a right of counter-claim he shall, in his statement of defence, state specifically that he does so by way of counter-claim." By r. 16, although the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with; and by r. 17, *ante*, p. 273, the court may give judgment for the defendant for any balance found in his favour. Under O. xix., rr. 15, *et seq.*, *ante*, p. 283, all matters in answer to a counter-claim or set-off must be pleaded in the same way as if it were a statement of claim, and by O. xxiii., r. 4, "where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence." O. xvi., r. 3, provides that

the improper or unnecessary joinder of a co-plaintiff shall not defeat a set-off or counter-claim, if the defendant prove it against the other plaintiffs. The nature of a counter-claim was much considered by the C. A. in *McGowan v. Middleton*, 11 Q. B. D. 464.

A counter-claim must contain, in itself, a specific statement of the facts on which relief is claimed, and it is not sufficient that those facts are stated in the defence, which forms with it one document in consecutive paragraphs, unless they are incorporated in the counter-claim by reference. *Holloway v. York*, 25 W. R. 627, M. R.; *Crowe v. Barnicot*, 6 Ch. D. 753. In these cases leave to amend the counter-claim was refused. It is sufficient, however, if the counter-claim refer to facts previously stated in the pleadings, without repeating them *in extenso*; *Birmingham Estates Co. v. Smith*, 13 Ch. D. 506. And it is not necessary that the counter-claim should be separately headed as such. *Lees v. Patterson*, 7 Ch. D. 866.

As to the delivery of particulars of set-off and their effect, *vide ante*, pp. 84, *et seq.*

The distinction between a set-off and counter-claim is still material for some purposes, and especially with reference to costs, *vide ante*, p. 275. A set-off alleges a liquidated demand due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows that on the whole account, between the plaintiff and the defendant, nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is therefore a defence to the action. As to what constitutes such liquidated demand, *vide post*, p. 627. A counter-claim, which is a creature of the J. Acts, *vide ante*, p. 625, is, on the other hand, in the nature of a cross action by the defendant, which may be made, although in respect of, or against a claim for unliquidated damages. *Stooke v. Taylor*, 5 Q. B. D. 576, *et seq.*, *per Cockburn, C. J.*; *Baines v. Bromley*, 6 Q. B. D. 694, *per Brett, L. J.* See also *Gathercole v. Smith*, 7 Q. B. D. 626, C. A. Matters are sometimes raised by counter-claim which amount to a defence to the action; see *Low v. Holme*, 10 Q. B. D. 286. As to costs generally in the case of a set-off or counter-claim, *vide ante*, pp. 274, 275. As to the effect of the County Courts Act, 1867, s. 5, and the J. Act, 1873, s. 67, *vide ante*, pp. 276, 277.

Where the defendant has been obliged to finish work which the plaintiff had contracted to do, and for which he seeks to recover a general money claim, the amount laid out by the defendant is not a set-off, but matter of deduction on a denial of the debt. *Turner v. Diaper*, 2 M. & Gr. 241. So, if the defendant find materials for work done by the plaintiff for him, he may deduct the value of such materials in an action for the work, without a set-off. *Newton v. Forster*, 12 M. & W. 722. So, where there are no cross demands, but the nature of the employment or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, the balance only is the debt. See *Green v. Farmer*, 4 Burr. 2221; *Le Loir v. Bristow*, 4 Camp. 134.

If the defendant put in evidence, to prove a set-off, an account rendered by the plaintiff, he must take both sides of the account, even where the plaintiff was an attorney, and the other side of the account consisted of the plaintiff's bill of costs, and no signed bill had been delivered by the plaintiff under the statute. *Harrison v. Turner*, 10 Q. B. 482. It has been held that a solicitor's bill may be set off without any previous delivery of a signed bill; for the 6 & 7 Vict. c. 73 (cited *ante*, p. 450), only prevents a solicitor from bringing "any action" before such delivery. *Brown v. Tibbits*, 11 C. B., N. S. 855; 31 L. J., C. P. 206; in which the decisions under the old acts, 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, which were not uniform, are reviewed. See, however, *Rawley v. Rawley*, 1 Q. B. D. 460, C. A., decided on similar words in 9 Geo. 4, c. 14, s. 5.

In *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713, Jessel, M.R. held that a cross claim, on a counter-claim, must have been complete at the date of the writ, on the ground that such proceeding was in lieu of a cross action brought at the same time as the plaintiff's action. In *Beddall v. Maitland*, 17 Ch. D. 174, however, Fry, J., gave relief on a counter-claim in respect of a cause of action accrued to the defendant after writ issued; and in *Toke v. Andrews*, 8 Q. B. D. 428, the plaintiff was allowed, in answer to such a counter-claim, to claim a debt which accrued due after writ issued. And a pecuniary set-off which has arisen since action brought, may be so pleaded under Rules 1883, O. xxiv., r. 1. *Ellis v. Munson*, 35 L. T., N. S. 585, C. A. Where a counter-claim is founded on a continuing cause of action, damages are now, under Rules, 1883, O. xxxvi. r. 58, ante, 284, assessed down to the time of assessment. The rule was formerly otherwise. See *Original Hartlepool Collieries Co. v. Gibb*, supra. In order to reply the Statute of Limitations with effect, it must appear that the set-off was barred before action *Walker v. Clements*, 15 Q. B. 1046. This principle will apply to a counter-claim.

As to set-off to action brought by assignee of chose in action, vide post, p. 629.

By the Truck Act, (1 & 2 Will. 4, c. 37), s. 5, in an action for wages of an artificer or workman in certain trades, a plea of set-off for goods supplied by the employer cannot be pleaded. See also 37 & 38 Vict. c. 48, s. 5. But a special reply of these statutes would be necessary.

Where the issues in the claim and counter-claim are the same, the plaintiff is not entitled to adduce fresh evidence, to contradict the defendant's evidence. *Green v. Sevin*, 13 Ch. D. 589.

Nature of the debt set off, and of the debts against which it is set off.] As above observed, it is still sometimes necessary to determine whether the defendant has a strict right of set-off as distinguished from a counter-claim, and for this purpose the following principles and decisions may be found useful. The debt set off may now be either a legal or an equitable debt. *Agra and Masterman's Bank v. Leighton*, L. R., 2 Ex. 56. So, the defendant can now set off a bond given by the plaintiff to a third party and assigned to the defendant. *Cochrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97. So, a set-off may be met by a reply that the plaintiff is suing as trustee only, and that the defendant had had notice of the assignment of the debt. *Watson v. Mid Wales Ry. Co.*, L. R. 2 C. P. 593; and see *Wilson v. Gabriel*, 4 B. & S. 243. Thus, where bonds are issued by a company, with the intention that they should be negotiable, it cannot, as against the equitable assignee of the bond, set off a debt due to the company from the obligee of the bond in whose name the action is brought. *Dickson v. Swansea Vale, &c. Ry. Co.*, L. R., 4 Q. B. 44; *Higgs v. Northern Assam Tea Co.*, L. R., 4 Ex. 387; *In re Northern Assam Tea Co.*, L. R., 10 Eq. 458; *In re Imperial Land Co. of Marseilles*, L. R., 11 Eq. 478; *In re Hercules Insur. Co.*, L. R., 19 Eq. 302. See further as to the principles on which a set-off was allowed in equity, *Middleton v. Pollock*, L. R., 20 Eq. 29. A joint and several note of the plaintiff and others to defendant may be set off against a debt due from defendant to plaintiff alone. *Owen v. Wilkinson*, 5 C. B., N. S. 526; 28 L. J., C. P. 3. But a debt due from the plaintiff to the defendant and another jointly, cannot be set off against a debt due to the plaintiff from the defendant alone. *Boyce v. Pwson*, 6 Q. B. D. 540. The two debts must be mutual and due in the same right. *Arnold v. Bainbrigg*, 9 Exch. 153; 23 L. J., Ex. 59. Where, on A.'s death, a banker, B., transferred the balance of A.'s account to the account of "C., executor of A.," C. being also residuary legatee; held, that this balance might be set off against other overdrawn accounts of C. with B., the lega-

tees not having given B. any notice of claim on the balance. *Bailey v. Finch*, L. R., 7 Q. B. 34. See also *Taylor v. Taylor*, L. R., 20 Eq. 155. But where A. had a separate account with a banker C., which was overdrawn, and A. and B. had also, as executors of D., a joint account with C., A. being residuary legatee of D., and A. and B. jointly liable for some unpaid claims; it was held that one account could not be set off against the other, because a Court would not, without any terms, or any further inquiry, compel B. to transfer the joint account to A. alone. *Ex pte. Morier*, 12 Ch. D. 491, C. A. A set-off is not an equity which runs with a bill or note indorsed when overdue; and therefore a set-off between the maker and indorser, of such a note, cannot be set up against the indorsee. *Whitehead v. Walker*, 10 M. & W. 696; *Oulds v. Harrison*, 10 Exch. 572; 24 L. J., Ex. 66; *Ex pte. Swan*, L. R., 6 Eq. 344. An antecedent debt cannot be set off against an instalment of a pension which is by statute not transferable. *Gathercole v. Smith*, 17 Ch. D. 1 C. A.; 7 Q. B. D. 626, C. A.

A judgment might be pleaded by way of set-off though a writ of error be pending thereon. *Reynolds v. Beerling*, cited 3 T. R. 188; see *Curling v. Innes*, 2 H. Bl. 372; and, where in an action on a promissory note for 30*l.*, the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for 11*l.*, to which there was a set-off of the note, the court held that, notwithstanding the verdict, the note might be set off. *Baskerville v. Brown*, B. N. P. 180; 2 Burr. 1229; *Evans v. Prosser*, 3 T. R. 186. A debt cannot be set off till it is actually due. *Rogerson v. Ladbroke*, 1 Bing. 99; but where it has become due after action brought, it may now be so pleaded. *Ellis v. Munson*, *ante*, p. 627. A debt barred by the Statute of Limitations cannot be set off; and if pleaded the plaintiff may reply the statute; B. N. P. 180; and it must be replied if relied on. Rules, O. xix., r. 15, *ante*, p. 283. See as to this reply, *ante*, p. 627.

A defendant may counter-claim a several claim, against one of two joint plaintiffs, and another several claim, against the other plaintiff. *Manchester &c. Ry. Co. v. Brooks*, 2 Ex. D. 243.

By Bankrupts.] The cases on mutual credit and set-off between a bankrupt and other persons will be found, *post*, Part III., tit. *Actions by Trustees of Bankrupts*. Where one of several joint debtors becomes bankrupt, there was no set-off. *New Quebrada Co. v. Carr*, L. R., 4 C. P. 651.

By and against executors.] *Vide post*, Part III., tit. *Actions by and against executors*.

By factors and agents.] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and, as such allowance is not in the nature of a cross demand or mutual debt, he may give it in evidence under a denial of the debt in an action for money had and received. *Dale v. Sollet*, 4 Burr. 2133. See also the cases cited *ante*, p. 627.

Where a factor sells goods without disclosing the name of his principal, the purchaser, being ignorant of the fact, in an action by the principal for the price, may set off a debt due to himself from the factor. *Rabone v. Williams*, 7 T. R. 360, n.; *George v. Clagett*, 7 T. R. 359; *Carr v. Hinchliff*, 4 B. & C. 547. So if, on a sale of goods to defendant, the agent hold himself out as owner, and not as agent of the plaintiff, the real owner, and the jury find that the plaintiff ostensibly allowed him to do so, then the plaintiff's claim is subject to any right of set-off existing between the agent and defendant. *Ramozotti v. Bowering*, 7 C. B., N. S. 851; 29 L. J., C. P. 30; *Borries v. Imperial Ottoman Bank*, L. R., 9 C. P. 38; *Ex pte. Dixon*, 4

Ch. D. 133. But, if the factor was known to be such, and to sell in that character, no such set-off can be pleaded against the principal; *Fish v. Kempton*, 7 C. B. 687; even though the defendant did not know who the principal was; *Semenza v. Brinsley*, 18 C. B., N. S. 467; 34 L. J., C. P. 161. See *Maspons v. Mildred*, 9 Q. B. D. 530, C. A.; 8 Ap. Ca. 874, D. P., cited *ante*, p. 539; and if, before the goods are all delivered, and before any part is paid for, the purchaser is informed that they belong to the plaintiff, it has been ruled that the purchaser cannot set off a debt due to him by the factor. *Moore v. Clementson*, 2 Camp. 22; see *Warner v. McKay*, 1 M. & W. 591; on this last case see *Fish v. Kempton*, 7 C. B. 687, 693, *per* Cresswell, J. If the purchaser buy through an agent, the knowledge of the agent that the apparent seller is an agent, will affect the purchaser, and exclude the set-off. *Dresser v. Norwood*, 17 C. B., N. S. 466; 34 L. J., C. P. 48, Ex. Ch. Where A.'s agent, B., by A.'s authority, employs a sub-agent, C., to sell A.'s goods in B.'s name, there is no privity between A. and C. (*vide ante*, p. 539), and in an action by A. against C. for the price realised, C. may set off any sum due from B. to C. *New Zealand, &c. Land Co. v. Watson*, 7 Q. B. D. 374, C. A.; *Kaltenbach v. Lewis*, 23 Ch. D. 54, 84, C. A. But in the case of goods sold after the revocation of C.'s authority by B.'s death, no such set-off is available, as the sale is wrongful; S. C. This head of set-off arises from the rule of law that a vendor, who accredits his agent and authorises him to contract, as principal, with a purchaser, who knows him only as principal, cannot, by resuming the character of principal, deprive his vendee of the equities which he has against the apparent vendor, whether by common law (as by payment), or by a set-off. It has been held that a broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and that the buyer, therefore, cannot set off a debt due from the broker to him, in an action for the price by the principal; *Baring v. Corrie*, 2 B. & A. 137; though, of course, the relation is capable of being modified by the course of dealing between the broker and his principal. See notes to *George v. Clagett*, 2 Smith's Lead. Cases. A mutual credit with an agent who becomes bankrupt is not within the principle of *George v. Clagett*, *supra*, in a case where the damages are unliquidated. *Turner v. Thomas*, L. R., 6 C. P. 610.

If a creditor sues one of two debtors jointly liable, the defendant may show that fact, and plead a set-off of a debt, due from plaintiff to the defendant, and his co-debtor. *Stackwood v. Dunn*, 3 Q. B. 822.

In action by company in course of winding up.] See post, Part III., tit. Actions by companies—Companies Act, 1862—Special defences to calls—Set-off.

*To action by assignee of chose in action.] A builder D. entered into a contract with the defendant to build a house; D. assigned his interest in the contract to the plaintiff, who sued the defendant thereon under J. Act, 1873, s. 25 (6), *ante*, p. 281, it was held that the defendant might set off or deduct from the plaintiff's claim, the damages he had sustained by D.'s breach of the contract, but could not recover damages against the plaintiff. *Young v. Kitchen*, 3 Ex. D. 127.*

Tender.

On issue joined as to the tender, the date of the writ, as stated on the statement of claim, is evidence of the commencement of the action; see *Whipple v. Manley*, 1 M. & W. 432.

The defence of tender is only applicable to cases where the party pleading has been guilty of no breach of his contract. *Hume v. Peploe*, 8 East, 168, 170, per Ld. Ellenborough, C.J. Hence, where a debt is payable on a day certain, as on an acceptance, a defence of payment *post diem* is generally inapplicable. S. C.; *Poole v. Tumbridge*, 2 M. & W. 223; 2 Wms. Saund. 486, (i). Where a note is payable on demand, a tender of the amount and interest *de die in diem* is a good defence. *Norton v. Ellam*, 2 M. & W. 461, 463, per Parke, B.

By whom a tender must be made.] The tender need not be made by the debtor himself; it is sufficient if made by his agent; and a tender by an agent, at his own risk, of more than the money given to him by his principal, is good. *Reul v. Goldring*, 2 M. & S. 86, post, p. 631.

To whom a tender must be made.] A tender to a person authorized by the creditor to receive money for him is sufficient. *Goodland v. Blewitt*, 1 Camp. 477; *Kirton v. Braithwaite*, 1 M. & W. 310. Where a clerk, in the habit of receiving money for his master, was directed by him not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307. So if he refuse, saying he had no instructions. *Finch v. Boning*, 4 C. P. D. 143, per Ld. Coleridge, C.J. But, a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed any authority from his master to receive the debt, was held insufficient. *Bingham v. Allport*, 1 Nev. & M. 398; accord. per Parke, B., *Watson v. Hetherington*, 1 Car. & K. 36. A tender of the debt sued for to the solicitor on the record, while he continues to be such, is a good tender to the principal. *Crozer v. Pilling*, 4 B. & C. 26. And a tender to a person in the office of the plaintiff's solicitor, to whom the defendant was referred by the clerk in the office, and who refused the tender only as being not enough, was held a good tender without showing who that person was. *Willmot v. Smith*, M. & M. 238. So, a tender to a person in the plaintiff's (a merchant) place of business, who appeared to be conducting it, is good, though not, in fact, entrusted to receive money. *Barrett v. Deere*, Id. 200. But it is otherwise where the payment is not connected with the plaintiff's business, but quite collateral to it. *Sanderson v. Bell*, 2 Cr. & M. 304. Where the money was brought to the house of the plaintiff and delivered to his servant, who appeared to go with it to his master and returned saying that his master would not take it, it was held to be evidence from which the jury might infer a tender. *Anon.*, 1 Esp. 349. A tender of a partnership debt to one of several partners is sufficient. *Douglas v. Patrick*, 3 T. R. 683.

Tender—to what amount.] Tender of a part of one entire debt is inoperative; *Dixon v. Clark*, 5 C. B. 365; and the debtor cannot apply a set-off in reduction of the amount due so as to make a tender of the balance good. *Searles v. Sadgrave*, 5 E. & B. 639; 25 L. J., Q. B. 15; *Phillipotts v. Clifton*, 10 W. R. 135, M. T. 1861, Ex. If the objection appear on the record, the defence may be objected to in point of law; otherwise the plaintiff must reply, that the sum tendered was part of a larger amount due, which formed one entire cause of action. *Hesketh v. Fawcett*, 11 M. & W. 356; *Dixon v. Clark*; *Searles v. Sadgrave*, supra. If a man tenders more than he ought to pay it is good; for the other ought to accept so much as is due to him. *Wade's case*, 5 Rep. 114; *Astley v. Reynolds*, 2 Str. 916. Thus proof of a tender of 20l. 9s. 6d. in bank notes and silver will support a plea of tender of 20l. *Dean v. James*, 4 B. & Ad. 546. But, it seems that such a tender is only

good where it is made in moneys numbered, so that the creditor may take what is due to him ; therefore a tender of a 5*l.* note, requiring change, is not good. *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Watkins v. Robb*, 2 Esp. 711; *Brady v. Jones*, 2 D. & Ry. 305. But, a tender of too much, without requiring change, is good. *Read v. Goldring*, 2 M. & S. 86. So, tender of enough to pay one of several items in a bill if offered in satisfaction of the whole, is not good ; but, if specifically applied by the debtor to that one item at the time of payment it is a good tender. *Hardingham v. Allen*, 5 C. B. 793. And, where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it only on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is good. *Black v. Smith*, Peake, 88; *Saunders v. Graham*, Gow, 121. So, where defendant laid down a gross sum in coin, and desired the plaintiff to tell him what was due, and to take principal and interest out of it, this was held good. *Bevans v. Rees*, 5 M. & W. 306. Where a party has several demands, for unequal sums against several persons, a tender of one sum for the debts of all, is not a good tender of any one of the debts. *Strong v. Harvey*, 3 Bing. 304. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglas v. Patrick*, 3 T. R. 683; and see *Black v. Smith*, *supra*. A tender to the creditor's solicitor, who has demanded payment, need not include the costs of the solicitor's letter. *Kirton v. Braithwaite*, 1 M. & W. 310; and see *Caine v. Coulton*, 1 H. & C. 764; 32 L. J., Ex. 97.

Tender—in what kind of money.] By the Coinage Act, 1870, (33 & 34 Vict. c. 10), s. 20, and sched. 2, the stats. 56 Geo. 3, c. 68, and 29 & 30 Vict. c. 65, are repealed, subject to the provision that—(3) “Every branch of the mint which at the passing of this act” (4th April, 1870) “issues coins in any British possession shall, until the date fixed by any proclamation, made in pursuance of this act, with respect to such branch mint, continue in all respects to have the same power of issuing coins, and be in the same position as if this act had not passed, and coins so issued shall be deemed, for the purpose of this act, to have been issued from the mint.”*

By sect. 4, “A tender of payment of money, if made in coins which have been issued by the mint in accordance with the provisions of this act, and have not been called in by any proclamation made in pursuance of this act, and have not become diminished in weight, by wear or otherwise, so as to be of less weight than the current weight, that is to say, than the weight (if any) specified as the least current weight in the first schedule to this act, or less than such weight as may be declared by any proclamation made in pursuance of this act, shall be a legal tender,—

In the case of gold coins for a payment of any amount ;

In the case of silver coins for a payment of an amount not exceeding 40*s.*, but for no greater amount ;

In the case of bronze coins for a payment of an amount not exceeding 1*s.*, but for no greater amount.

Nothing in this act shall prevent any paper currency which under any act, or otherwise, is a legal tender from being a legal tender.”

The schedule gives least current weights in the case of gold coins only.

Sect. 11 empowers her majesty in council by proclamation, among other

* Under 29 & 30 Vict. c. 65, s. 1, the sovereigns and half-sovereigns issued by the branch mint of New South Wales were made, and have continued to be a legal tender.

things—(5) To call in coins; (6) To direct that any coins other than gold, silver or bronze, may be current and a legal tender up to 5s.; (7) To direct that coins coined in any foreign country may be a legal tender at prescribed rates, having regard to the weight and fineness of the coin as compared with the current coins of the realm; (8) To direct the establishment of branch mints in her majesty's dominions.

By the 3 & 4 Will. 4, c. 98, s. 6, it is provided that a tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes for all sums above 5l. on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin; provided that no such note shall be deemed a legal tender of payment by the Bank of England, or any of its branch banks. It may be observed that these notes are not a legal tender in Ireland, 8 & 9 Vict. c. 37, s. 6; or, Scotland, *Id.* c. 38, s. 15.

The party to whom the tender is made is not obliged to state his objection to receiving it, but, if he does so, he must rely on the objection he states, and he will be taken to have waived other objections. Thus, if he claim a larger amount than that offered, and give that alone as a reason for not accepting it, he cannot afterwards object that the tender was in country bank notes; *per* Bayley, B., in *Polglass v. Oliver*, 2 C. & J. 17; *Lockyer v. Jones*, Peake, 180, n. A tender of a banker's cheque may be good under the like circumstances. *Wilby v. Warren*, Tidd. Prac. 8th ed. 187; *Jones v. Arthur*, 8 Dowl. 442.

Tender—money must be produced.] The actual production of the money due is necessary, unless the creditor dispense with the production of it at the time, or does anything which is equivalent to a dispensation. *Thomas v. Evans*, 13 East, 101; *Polglass v. Oliver*, *supra*. In *Thomas v. Evans*, *supra*, the defendant left 10l. with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called, and the plaintiff said he would not receive the 10l. nor anything less than his whole demand, but the clerk did not produce the 10l., this was held to be no tender; and *Dickinson v. Shee*, 4 Esp. 68, is to the same effect. But, where the defendant went to the plaintiff and told him he had 8l. 18s. 6d. in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him, "he need not give himself the trouble of offering it, for that he would not take it," the tender was held to be good. *Douglas v. Patrick*, 3 T. R. 684; and see *Ryder v. Townsend*, 7 D. & Ry. 119. The agent of the defendant met the plaintiff in the street, and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4l.; the plaintiff said he would not take it; the witness then said he would give him the other 10s. out of his own pocket, and run the risk of being repaid; he then pulled out his pocket-book, and told the plaintiff that, if he would go into a neighbouring public-house, he would pay him, but the plaintiff said he would not take it; this was held to be a good tender of 4l. 10s. *Read v. Goldring*, 2 M. & S. 86. Where a witness stated that the defendant was willing to give the plaintiff 10l., and the witness offered to go and fetch that sum, but that the plaintiff said "she need not trouble herself, for he could not take it," this was held to be a good tender. *Harding v. Davies*, 2 C. & P. 77. And see also *Polglass v. Oliver*, *supra*, from which it would appear that the tender in *Thomas v. Evans*, *supra*, ought to have been held sufficient. Where money was offered by letter, which the plaintiff declined by letter, saying, "I decline your tender," this was held insufficient. *Powney v. Blomberg*, 14 Sim. 179. On a plea of tender of 1l. 12s. 6d., the jury found, specially, that

the defendant's attorney called on the plaintiff, and said, "I come to pay you 1*l.* 12*s.* 6*d.* which the defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it; the matter is now in the hands of my attorney." It was held that, upon this finding, the defendant was not entitled to judgment. *Finch v. Brook*, 1 N. C., 253; S. C., 1 Scott, 70. But, the court seem to have been of opinion that a dispensation of the production might have been inferred from the above facts, and found by the jury. See *Ex parte Danks*, 2 D. M. & G. 936; 22 L. J., Bky. 73.

Tender must be unconditional.] In order to support a plea of tender, there must be evidence of an *unqualified* offer. An offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. *Evans v. Jenkins*, 4 Camp. 156; *Huzham v. Smith*, 2 Camp. 21; *Strong v. Harvey*, 3 Bing. 304; *Hough v. May*, 4 Ad. & E. 954. But, a tender, accompanied by a statement by the defendant that "he has come to pay the amount of his (the plaintiff's) bill," is sufficient, though the plaintiff insisted that "it was not his bill," and refused it on that account; for such statement is no more than is implied in every tender, viz., that the debtor intends to cover the whole demand, and asserts that it does so. *Henwood v. Oliver*, 1 Q. B. 409; *Bowen v. Owen*, 11 Q. B. 130. So, a tender of the full amount demanded, accompanied with a protest is good. *Manning v. Lunn*, 2 Car. & K. 13; *Thorpe v. Burgess*, 8 Dowl. 603; *Scott v. Uzbridge & Rickmansworth Ry. Co.*, L. R., 1 C. P. 596; *Sweeny v. Smith*, L. R., 7 Eq. 324; and *Simmons v. Wilmott*, 3 Esp. 94, seems to be not law. If the tender cannot be accepted, without supplying evidence of an admission that no more is due, then it is conditional, and therefore bad. *Bowen v. Owen*, *supra*. So, where a tender is accompanied with a demand of a receipt in full of all demands. *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely*, Gow, 213; *Ryder v. Townsend*, 7 D. & Ry. 119. Where the defendant tendered the money, saying, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff refused to take it, Abbott, C.J., held this to be no tender. *Laing v. Meader*, 1 C. & P. 257. It was held in that case that the debtor ought to present a piece of paper, stamped with the *ad valorem* receipt stamp, to the creditor, and require him to give a receipt; if the latter refused to do so, and to pay for the receipt stamp, he was liable to a penalty by the 43 Geo. 3, c. 126, ss. 4, 5. This enactment was repealed by 33 & 34 Vict. c. 99, and under the Stamp Act, 1870, s. 123, the payee of money is liable to a penalty if, in any case where a receipt would be liable to duty, he refuse to give a receipt duly stamped, and he is bound also, under sect. 121, to cancel the stamp if adhesive; but as there is no provision, as in the earlier Act, that the debtor must present a receipt for the creditor to sign, the creditor must now find the stamp; as, however, the stamp is a uniform one of 1*d.*, this is productive of no great hardship. But, though a party, tendering money, cannot, in general, demand a receipt for it, yet where the creditor did not object to the demand of a receipt, but only that the sum was insufficient, the tender was held good. *Richardson v. Jackson*, 8 M. & W. 298. Some doubt seems to have been expressed in this case as to whether the demand of a receipt, in any case, would render a tender insufficient. But, where two quarters' rent, due Michaelmas and Christmas, was demanded, and the tenant tendered the Christmas only, and demanded a receipt for that quarter's rent, this was held to be no sufficient tender even of that quarter's rent, the contest between the parties being whether one or two quarters' rent was due. *Finch v. Miller*, 5 C. B. 428. Where the defendant tendered a sum of money, and at the same time delivered a counter-claim upon the plaintiff,

and the plaintiff did not take up the money or paper, but simply said, "You must go to my attorney," the tender was held insufficient. *Briggs v. Jones*, 2 D. & Ry. 305.

Whether a tender be conditional or not is a question for the jury, where the words or facts accompanying it are disputed. *Eckstein v. Reynolds*, 7 Ad. & E. 80. But, if the goodness of it turns on the meaning or legal effect of a letter or writing accompanying it, then the question is for the judge; *semble*, *Boren v. Owen*, 11 Q. B. 130. And the same rule would seem, as a principle, to apply to unwritten expressions used by the party tendering, where the tenor of them is not disputed.

Tender—prior or subsequent demand and refusal.] The defence will be defeated by showing a demand and refusal, prior or subsequent to the tender. *Bennett v. Parker*, 1 R., 2 C. L. 89, Ex.; *Poole v. Tunbridge*, 2 M. & W. 223, 226; 1 Wms. Saund. 33 c, (2). The demand and refusal must now be replied specially. Rules 1863, O. xix., r. 15, *ante*, p. 283. The demand must be proved to be of the precise sum tendered. *Spybey v. Hilds*, 1 Camp. 181; *Rivers v. Griffiths*, 5 B. & A. 630. The demand must be by a person authorized at the time to receive the money; and therefore a demand by a clerk of the plaintiff's solicitor (who does not bring his master's receipt) is insufficient. *Coore v. Callaway*, 1 Esp. 115. And the subsequent adoption of an unauthorized demand is not enough. *Story on Agency*, s. 247. A subsequent demand upon one of two joint debtors is sufficient. *Peirce v. Bowles*, 1 Stark. 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered, is not sufficient evidence of a subsequent demand; for, at the time of the demand, the defendant should have an opportunity of immediately paying the sum demanded. *Edwards v. Yeates*, Ry. & M. 360; but see *Hayward v. Hagar*, 4 Esp. 93.

ACTIONS ON SPECIALTIES.

ACTION ON COVENANTS RELATING TO LAND.

The evidence in this action depends upon the particular breaches of covenant alleged by the plaintiff, and the mode in which they are stated or denied in the pleadings. A covenant is nothing more than an agreement expressed in an instrument in writing, executed as a deed. Such agreements, after proof of the deed in which they are contained, are subject to the rules of construction applicable to ordinary documents. As land is for the most part conveyed and leased by instruments under seal, certain covenants usually inserted in these instruments are frequently the subject of an action. The evidence necessary in the proof of a breach of several of the more important of these covenants will here be given.

Covenants in general.] There need be no formal words of covenant. Any words in a deed, showing an agreement to do a thing, make a covenant; as "that the lessee shall repair;" *Com. Dig. Covenant, (A. 2)*. "It is agreed that A. shall pay B. for his goods," is a covenant by B. to deliver them to A., as well as by A. to pay. So, a lease by A. to B. "excepting a room and free passage to it," is a covenant by B. not to disturb the passage, but is not a covenant as to disturbing in the room. So, a covenant may be in the form of a proviso or condition. *Id.*; *Brookes v. Drysdale*, 3 C. P. D. 52. A recital of an intended fine in an agreement may amount to a covenant to levy one. *Id.*; *Farrall v. Hilditch*, 5 C. B., N. S. 840; 28 L. J., C. P. 221. So the recital in a lease of the intention of the parties that a mill should be erected, and a covenant to leave it in repair, amount in law to a covenant to erect it. *Sampson v. Easterby*, 9 B. & C. 505; 6 Bing. 644, Ex. Ch. But, a conveyance by A. to a railway company of land, "intended to be formed into a new course" for a river, and a covenant by the company to make a bridge over the new cut for A.'s use, does not imply a covenant to make the new cut or divert the river. *Rashleigh v. S. E. Ry. Co.*, 10 C. B. 612. This case was, however, doubted in the House of Lords on an appeal, and was compromised. See *Knight v. Gravesend, &c. Waterworks Co.*, 2 H. & N. 6; 27 L. J., Ex. 73. An acknowledgment by A. in a deed that he owes B. £—, may be treated as a covenant to pay, if an intention to enter into an engagement to pay appear on the face of the deed; *Saunders v. Milsome*, L. R. 2 Eq. 573; but, not if the acknowledgment be merely for a collateral purpose. *Courtney v. Taylor*, 6 M. & Gr. 851; *Holland v. Holland*, L. R., 4 Ch. 449; *Jackson v. N. E. Ry. Co.*, 7 Ch. D. 573. See also *Knight v. Gravesend, &c. Waterworks Co.*, *supra*. An indenture between A. and B. provided that A. should buy all the coal used by him, from B., but that B. "should not be compelled to supply more than 500 tons per week," and in case of inability to supply "to the extent agreed upon," and notice thereof to A., A. might buy elsewhere: this was held to be a covenant by B. to supply coal to the extent of 500 tons unless unable from substantial cause. *Wood v. Copper Miners' Co.*, 7 C. B. 906. A covenant by the lessee of a coal mine to draw to, and deposit on the surface of the demised premises by some of the pits or shafts of the demised mine, for the use of the lessor, all the manure made underground, does not imply a covenant by the lessee to make pits or shafts on the demised land, although such pits may have been contemplated by both parties. *James v. Cochrane*, 7 Exch. 170; 21 L. J., Ex. 229; Ex. Ch., 8 Exch. 556; 22 L. J., Ex. 201.

By the 8 & 9 Vict. c. 106, s. 4, in deeds executed since the 1st October, 1845, the word "give" or "grant" shall not imply any covenant in respect

of real property, except by force of some Act of Parliament (such as by the Lands Clauses Consolidation Act, 1845, s. 132). This is in reference to the old authorities by which covenants were implied from the words "give," "grant," and "demise;" Com. Dig. Covenant, (A. 4). The former Act does not restrain the effect of the word "demise," which still implies a covenant for title, but such implied covenants are restrained by express covenants contained in the same deed and incompatible with them; *expressum facit cessare tacitum*; Shep. Touch. cap. 7, p. 165. *Vide post*, pp. 659, 660. As to the covenants for title now implied in conveyances by virtue of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, *vide post*, p. 657.

The following are some of the most material issues arising in actions on deeds and bonds generally:—

Evidence on defences denying execution of deed.] By Rules, 1883, O. xix. r. 20, *ante*, p. 283, under this defence, which now in part takes the place of the old plea of *non est factum*, the plaintiff need only produce and prove the execution of the deed. As to the proof of the execution of corporation deeds, *vide ante*, p. 123; of private deeds, *ante*, p. 124, *et seq.* Where the action is not for any liquidated sum, it is also necessary to prove the amount of damage.

Formerly, where a deed was pleaded according to its supposed legal effect, *non est factum* put in issue not only the execution of it, but the legal effect as stated. *North v. Wakefield*, 13 Q. B. 536. The plea in such a case, in effect, denied execution of any deed, corresponding with the one described in the count. But where the deed was recited *verbatim*, the construction was for the court on demurrer, and *non est factum* only denied the execution, or the accuracy of the transcript of the deed set forth. *Semb.* S. C. It seems, however, that Rules, 1883, O. xix., rr. 15, 17, *ante*, p. 283, will now in many cases require a special defence to be pleaded.

Under special defences the defendant may show that the deed was executed as an escrow, and was to take effect as a deed only upon some given event which has not happened; or that the deed, after being sealed, was tendered to the covenantee, and he expressly rejected it; *ante*, p. 129; or in the case of a corporation deed, irregularity, or want of due authority in the execution of the deed; *ante*, p. 123.

If the seal, other than that of the defendant, be removed, the deed may be given in evidence, if it be a several deed; *Matthewson v. Lydiat*, 5 Rep. 22; Cro. Eliz. 408; *contra*, if it be a joint or joint and several deed. *Id.*; *Seaton v. Henson*, 2 Lev. 220.

Where a bond is produced at the trial in a cancelled state, *e.g.*, with the seal broken off, the question seems to be whether the bond was cancelled before or after defence pleaded. *Nicholls v. Haywood*, Dyer, 59 a; *Michad v. Stockwith*, Cro. Eliz. 120; *Whelpdale's case*, 5 Rep. 119; and see *Todd v. Emly*, 11 M. & W. 1. But the party relying on the deed may show that the seal was removed under circumstances not amounting to a cancellation. *Vide ante*, pp. 589, 590.

If a bond be sealed and delivered to a man's use, and he die before notice, his executors may sue upon it. Dyer, 167.

In an action by lessor, on covenants contained in a lease under seal, and which depend on the existence of the term, as, for instance, those to repair and pay rent during the term, the defendant may set up as a special defence that the lease has not been executed by the lessor. *Sicatman v. Ambler*, 8 Exch. 72; 22 L. J., Ex. 81; *Pitman v. Woodbury*, 3 Exch. 4. *Quære*, if he can do so after he has entered and occupied during the term. *Vide* S. C. and *Cooch v. Goodman*, 2 Q. B. 580. And such a defence is not applicable to a covenant to invest money contained in a mortgage deed. *Morgan v.*

Pike, 14 C. B. 473 ; 23 L. J., C. P. 64. If the defendant got all the title he stipulated for, an informality in the execution by the lessors will not affect the lessee's covenants. *How v. Greek*, 3 H. & C. 391 ; 34 L. J., Ex. 4 ; *Toler v. Slater*, L. R., 3 Q. B. 42.

The lease may be proved *prima facie* by producing the counterpart executed by the defendant, without notice to produce the original lease. *Houghton v. Kenig*, 18 C. B. 235 ; 25 L. J., C. P. 218. But the defendant may put in the original lease, and show that it is void by reason of the non-execution thereof by the lessor. *Wilson v. Woolfryes*, 6 M. & S. 341 ; see further, *supra*. Where there is a discrepancy between the two instruments the lease shall prevail ; *Sheppard's Touchstone*, 52 ; unless the lease only is inconsistent with itself, in which case reference may be made to the counterpart, to ascertain and correct the mistake. *Burchell v. Clark*, 2 C. P. D. 88, C. A. But generally where an indenture is in two parts, one party executing each part, if there is a material variation between the two parts, the indenture is void for want of mutuality. *Wynne's case*, L. R., 8 Ch. 1002.

Where one of several covenantees sued as sole covenantor without joining the others or showing their death, this was formerly a variance on a plea denying the contract ; but if one of several joint covenantors were sued without naming or joining the rest, this was only pleadable in abatement ; 1 Wms. Saund. 154 a, (1). A covenant by A., B., and C., that they or some of them will pay, &c., may be sued as on a covenant by any one of them. *Caldwell v. Becke*, 2 Exch. 318.

A question formerly arose under a denial of the contract, or other appropriate defence, whether the plaintiffs, who sued, were the proper parties to the action. Where the covenant is with A. and B. jointly, yet if the interest of each is several, as on a conveyance of distinct lands by each, they could not join as plaintiffs ; 1 Wms. Saund. 154, (1) ; although they can now do so under Rules, 1883, O. xvi., r. 1, *ante*, p. 86. But, if the covenant is expressly made to several, though for the benefit of one only, it is a joint covenant and all should join. *Anderson v. Martinale*, 1 East, 497. The rule, as expressed in the latest cases, is that where the covenant is to or with several persons, it will be construed to be joint or several, according to the interest of the covenantees apparent in the deed, provided that the words admit of such construction. But, if the covenant be expressly and unambiguously a joint one, then the interest will not control the construction, and all the covenantees must join. *Sorsbie v. Park*, 12 M. & W. 146 ; *Hopkinson v. Lee*, 6 Q. B. 964 ; *Haddon v. Ayers*, 1 E. & E. 118 ; 28 L. J., Q. B. 105.

The benefit of an indivisible covenant, *e.g.*, to repair or work mines, on a joint demise by tenants in common, runs with the entire reversion only ; and therefore all the covenantees or their representatives must join in suing on a breach of the covenant. *Thompson v. Hakewell*, 19 C. B., N. S. 713 ; 35 L. J., C. P. 18, following *Foley v. Addenbrooke*, 4 Q. B. 197 ; and on the authority of Litt., s. 314 ; Co. Litt. 196 b ; see also *Bradburne v. Botfield*, 14 M. & W. 559 ; *Wakefield v. Brown*, 9 Q. B. 209 ; *Keightley v. Watson*, 3 Exch. 716 ; *Magnay v. Edwards*, 13 C. B. 479 ; *Pugh v. Stringfield*, 3 C. B., N. S. 2 ; 27 L. J., C. P. 34. It would seem that if the covenant, in such a lease, were to pay a money or other divisible rent, the tenants in common or their representatives might maintain separate actions for their respective shares of the rent. See *Thompson v. Hakewell*, *supra*.

The Rules, 1883, O. xvi., as to nonjoinder and misjoinder of parties, will be found *ante*, pp. 86, 87. It seems that under them, objection to the nonjoinder of a plaintiff must be taken before the trial. See cases cited *ante*, p. 87, and *Werderman v. Société Générale d'Electricité*, 19 Ch. D. 246, C. A., where, however, the judgment of Jessel, M.R., was based (*vide Id.* 251), on an erroneous view of the practice at common law, *vide Thompson v. Hakewell*, *supra*.

The insertion of more covenantors than ought to be joined is now immaterial. *Vide ante*, pp. 86, 87. Where the action is on an implied covenant, persons who are parties to the deed, only for confirmation, with no legal estate (as where trustee and *cestui que trust* join as lessors), should not be joined as defendants. *Smith v. Pocklington*, 1 C. & J. 445. Whether, in an action by assignees of the reversion on express covenants, it is proper to join as complainants persons who have no legal interest in the reversion, is a question not yet at rest; see *Wakefield v. Brown*, and *Magnay v. Edwards*, *ante*, p. 637.

At common law, no person not made, by name or description, a party to an indenture could sue thereon. Com. Dig. Fait, (D. 2); *Chesterfield, dx. Colliery Co. v. Hawkins*, 3 H. & C. 677; 34 L. J., Ex. 121; *Kitchin v. Hawkins*, L. R., 1 Q. B. 22. But now by 8 & 9 Vict. c. 106, s. 5, under an indenture executed after 1st October, 1845, "the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture."

Alteration of deed.] The cases relating to the alteration of deeds are collected with those relating to simple contracts, *ante*, pp. 588, *et seq.*

Fraud.] *Vide ante*, p. 590.

Payment under covenant, &c.] *Vide post*, p. 615.

Statutes of Limitation to actions on specialty.] The Stat. of Limitation, 21 Jac. 1, c. 16, *ante*, p. 602, did not apply to deeds or specialties. The statutes applying to such instruments are 3 & 4 Will. 4. cc. 27, 42; 19 & 20 Vict. c. 97; and 37 & 38 Vict. c. 57.

By the stat. 3 & 4 Will. 4, c. 27, the limitation of actions for rent, and annuities and other periodical sums charged upon or payable out of land, is regulated.

By sect. 42, "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

By the Real Property Limitation Act, 1874, (37 & 38 Vict. c. 57), which (sect. 12) came into operation on 1st January, 1879, sect. 8, "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought

but within 12 years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given." By sect. 10, "after the commencement of this act" (*ante*, p. 638) "no action, suit, or other proceeding shall be brought to recover any sum of money or legacy, charged upon, or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust."

Sects. 8 (*ante*, p. 638) & 9 replace 3 & 4 Will. 4, c. 27, s. 40, under which section the period of limitation was 20 years instead of 12.

By 23 & 24 Vict. c. 38, s. 13, the period of limitation for claims in respect of the share of the estate of an intestate, made against his personal representative, is 20 years.

A payment to prevent the barring by stat. 37 & 38 Vict. c. 57, s. 8, must be an acknowledgment, by the person making the payment, of his liability, and an admission of the title by the person to whom it is paid. *Harlock v. Ashberry*, 19 Ch. D. 539, C. A. It must be made by the person liable to pay principal or interest; payment of rent by the tenant of the mortgaged property, to the mortgagee in pursuance of notice by him, is no bar. *S. C.* Where the receiver appointed by the court to receive the rents of three estates, A., B., and C. included in one mortgage, entered into possession of C. only and out of the rents paid the mortgage interest, this was held to be in law payment by the mortgagor in respect of the mortgage debt, and prevented the statute from operating. *Chinnery v. Evans*, 11 H. L. C. 115; see also *Crown v. Dennehy*, 1 R., 3 C. L. 289, C. P.

By the stat. 3 & 4 Will. 4, c. 42, the period of limitation in actions of debt on specialty, and in some other actions, is defined. By sect. 3, it is enacted, that all actions of *debt for rent* upon an indenture of demise, all actions of *covenant or debt upon any bond*, or other *specialty*, and all actions of *debt or scire facias upon any recognizance*, shall be sued or brought within 20 years after the cause of such actions or suits, but not after; provided, that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

By sect. 4, provision is made for persons who are, at the time such cause of action accrued, within the age of 21 years, covert, of unsound mind, or *beyond the seas*; such person to be at liberty to bring the actions, so as they commence the same within such times after their coming to, or being of, full age, discover, of sound memory, or *returned from beyond the seas*, as other persons having no such impediment should, according to the provision of the act, have done; and if any person against whom there shall be any such cause of action, shall be, at the time of cause of action accrued, beyond the seas, then the person entitled shall be at liberty to sue such person within the times before limited after the return of such person from beyond the seas. [As to the words in italics, *vide* 19 & 20 Vict. c. 97, *post*, p. 640.]

Sect. 5. Provided that, if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment, or part satisfaction on account, of any principal or interest then due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within 20 years after such acknowledgment or part payment or part satisfaction; or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making it, beyond the seas, then within 20 years

after the disability shall have ceased, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in such action may, by way of replication, state such acknowledgment, and that the action was brought within the time aforesaid, in answer to a plea of this statute.

Sect. 7. No part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, being dominions of the Queen, are to be deemed beyond seas within the meaning of this act.

By 19 & 20 Vict. c. 97 (already cited, *ante*, p. 605), s. 10, no person or persons entitled to any action limited by the acts 3 & 4 Will. 4, c. 27, s. 42, or *Id.* c. 42, s. 3 (*ante*, pp. 638, 639,) shall be entitled to any further time to sue by reason only that such person, or one or more of such persons, was or were beyond seas at the time when the cause accrued; and by sect. 11, in case of joint debtors, no further time is to be allowed for suing, by reason only that some of them were beyond seas when the cause accrued; but a judgment recovered in such case will not *per se* be a bar to an action against the absent debtor or debtors after their return. Sect. 14 (cited *ante*, p. 609), also provides that part payment by one debtor shall not deprive his co-debtor of the benefit of the statute.

By the J. Act, 1873, s. 25, (2), no claim by a *cestui que trust* against his trustee on an express trust is to be barred by any Statute of Limitations. See, however, 37 & 38 Vict. c. 57, s. 10, *ante*, p. 639. But although the claim is not barred by the statute, yet where there has been laches on the part of the plaintiff, his remedy may be limited to six years' arrears of interest. *Thomson v. Eastwood*, 2 Ap. Ca. 215, D. P. See further *ante*, p. 603.

The effect of the 3 & 4 Will. 4, c. 27, s. 42, and c. 42, s. 3 together, is that no more than six years' arrears of rent or interest in respect of any sum charged on, or payable out of any land or rent shall be recovered by way of distress, action, or suit, other than and except an action of covenant or debt on the specialty, in which case the limitation is 20 years. *Page v. Foley*, 2 N. C. 679; *Sims v. Thomas*, 12 Ad. & E. 536; *Grant v. Ellis*, 9 M. & W. 113; *Manning v. Phelps*, 10 Exch. 59; 24 L. J., Ex. 62; *Bowyer v. Woodman*, L. R., 3 Eq. 313.

On the other hand, by 37 & 38 Vict. c. 57, s. 8, *ante*, p. 638, in an action on the covenant in a mortgage deed, to pay the mortgage debt, the period of limitation has been reduced to 12 years, *Sutton v. Sutton*, 22 Ch. D. 511, C. A.; so in an action on a bond given as collateral security with a mortgage, *Fearnside v. Flint*, 22 Ch. D. 579; and so in an action on a judgment, even although a suggestion has, within 12 years, been entered on the roll under C. L. P. Act, 1852, s. 129. *Ex parte Tynite*, 15 Ch. D. 125.

As to what cases fall within the stat. 3 & 4 Will. 4, c. 42, s. 3, and what within stat. 21 Jac. 1, c. 16, s. 3, *vide ante*, pp. 602, 603.

As to the applicability of the Statutes of Limitations to breaches of covenants for title, *vide post*, pp. 657, 658.

Mere delay in enforcing a specialty debt for any period within 20 years affords no bar to its recovery. *Collins v. Rhodes*, 20 Ch. D. 230, C. A.

A general replication never let in the subsequent promise, acknowledgment, or payment, as in actions for simple contract debts; for proof of a promise, not under seal, did not support the declaration; and if, under seal, it was another and different cause of action. If there were a sufficient written acknowledgment within 3 & 4 Will. 4, c. 42, s. 5, it must have been specially replied. *Kempe v. Gibbon*, 9 Q. B. 609. And this is still the rule. It must be shown which of the three sorts of acknowledgments,—viz., writing, payment, or satisfaction in part—is relied on. *Forsyth v. Bristowe*, 8 Exch. 347; 23 L. J., Ex. 70. The acknowledgment need not imply a promise, or be in itself a cause of action. *Moodie v. Bannister*, 4 Drew. 432; 28 L. J., Ch. 881; and an admission by the executors of the obligor in their answer to a suit *inter alios* is enough. *Id.*

In an action of covenant for 400*l.*, due on a mortgage deed, to which the plea of Stat. of Limitations was pleaded, plaintiff replied an acknowledgment within 20 years, and put in a deed of conveyance by defendant to trustees for payment of "all mortgages, debts, &c.," in which it was recited that the land was "subject to a mortgage to W. H. (plaintiff) for 400*l.* and interest:" held insufficient, because it did not acknowledge an existing debt, but only an outstanding mortgage. *Howcutt v. Bonser*, 3 Exch. 491. In an action by mortgagee against mortgagor, for principal and interest, after the lapse of 20 years, defendant pleaded the statute, to which plaintiff replied an acknowledgment in writing, and also part payment, within 20 years: within 20 years the defendant had assigned his equity of redemption, by a deed reciting payment of interest "up to the date thereof:" held, that this was evidence of payment within 20 years: held, also, that payment of interest by the assignee after assignment, was payment by the "agent" of the defendant. *Forsyth v. Bristowe*, 8 Exch. 716; 22 L. J., Ex. 255. It was there considered that the acknowledgment, under sect. 5, need not be made to the creditor or agent, though that is required by stat. 3 & 4 Will. 4, c. 27, s. 42, and 37 & 38 Vict. c. 57, s. 8, *ante*, p. 638.

On a plea that the "debt and cause of action" did not accrue, *infra*, &c., pleaded to a bond, declared upon, without showing the condition, and issue thereon, it appeared at the trial to be a *post obit* bond, and that the *cestui que vie* died within 20 years: held, that the plaintiff was entitled to recover, for the real cause of action arises on the condition. *Tuckey v. Hawkins*, 4 C. B. 655. To a declaration on a bond, without stating the condition, which was for payment of an annuity, the defendant pleaded that the causes of action did not accrue within 20 years; on which plaintiff joined issue, and suggested breaches of non-payment of arrears within 20 years. On the trial it appeared that there had been *also* breaches of condition 20 years ago, by payments of the annuities at irregular times, all of which, however, had been accepted by the plaintiff: held, that a new cause of action arose on each breach of the condition; that the previous breaches had been waived by acceptance, and that the plaintiff was entitled to a verdict on the issue. *Amott v. Holden*, 18 Q. B. 593; 22 L. J., Q. B. 14. A bond conditioned to replace stock is not within sect. 5 of the act, which relates only to conditions for payment of money; therefore an acknowledgment that it was not replaced, and a payment, within 20 years, of money conditioned to be paid in lieu of dividends, if the stock should not be replaced, will not rebut the statute so far as relates to the breach of condition to replace. *Blair v. Ormond*, 17 Q. B. 423; 20 L. J., Q. B. 444. But, the condition to pay periodically the money due in lieu of dividends, was held to continue in force, and that plaintiff was entitled to damages for a breach for *non-payment* within 20 years. S. C.

M. died indebted on a bond, in which the heirs were bound, having devised his estates in strict settlement; payment of interest by the devisee in possession, who took a life estate, was held to prevent the devisee in tail, in remainder, from setting up the statute when he came into possession. *Roddam v. Morley*, 1 De G. & J. 7; 26 L. J., Ch. 438; *accord*, *Pears v. Laing*, L. R., 12 Eq. 41. But see *Coope v. Cresswell*, L. R., 2 Ch. 112.

As to the application of the Statute of Limitations to actions by and against executors; *vide post*, Part III., *Actions by and against executors*.

The following are some of the most material issues arising in actions on leases or other conveyances of real property.

Evidence where plaintiff sues as assignee of reversion.] Where the lessor at the time of granting a lease has no title, but afterwards acquires one, the lease and reversion take effect in interest, and an action will lie by

the assignee of the reversion on the covenants in the lease. *Webb v. Austin*, 7 M. & Gr. 701, and 728, n.; *Sturgeon v. Wingfield*, 15 M. & W. 224. And in *Cuthbertson v. Irving*, 4 H. & N. 742; 28 L. J., Ex. 306, it was decided that a mortgagor of premises, having leased them to the defendant, by an instrument which did not, and afterwards assigned the reversion by an instrument which *did*, declare his title, the defendant was estopped from objecting to the equitable title of the assignee. In this last case the interest of the plaintiff was purely one by estoppel. The lessee is not estopped from showing that the lessor had not a fee simple in the land demised, provided he does not assert that he had no estate in the land which would give effect to the deed. *Weld v. Baxter*, 11 Exch. 816; 25 L. J. Ex. 214; 1 H. & N. 568; 26 L. J., Ex. 112. If the lessor's want of title appear on the lease, both parties are estopped from asserting a legal reversion, and the covenants are in gross, and not assignable. *Pargeter v. Harris*, 7 Q. B. 708; and see *Saunders v. Merryweather*, 3 H. & C. 902; 35 L. J. Ex. 115; and further, *post*, *Action for recovery of land by landlord, and Replevin—Tenancy of the Plaintiff*. Where a lessee makes an underlease for more than his term, and reserves rent, this rent is assignable by way of estoppel, and the assignee can sue the underlessee for the rent without attornment. *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 372. The assignee of part of the reversion in all the land may sue. *Co. Litt.* 215 a; 1 Wms. Saund. 241 a (5) (c); so the assignee of the reversion of part of the land. *Twynam v. Pickard*, 2 B. & A. 105; and so a reversioner who has assigned the reversion of a part only. *Swansea, Mayor, &c. of, v. Thomas*, 10 Q. B. D. 48, cited, *post*, p. 646.

Evidence on defence of assignment over of reversion by plaintiff. The lessor cannot bring an action of covenant on the lease, after he has parted with his reversion, for any breach of a covenant running with the land, which has accrued subsequently to the grant of the reversion, but the action can be brought only by the assignee of the reversion; for the stat. 32 Hen. 8, c. 34, has transferred the privity of the contract, together with the estate in the land, to the assignee of the reversion. 1 Wms. Saund. 241 f (6). The defendant may therefore plead that the breach accrued after the assignment by the lessor of his reversion; but as the stat. 32 Hen. 8, c. 34, only applies to leases by deed, such a defence is inapplicable to a claim on a parol lease. *Vide ante*, p. 317. For the same reason the defence applies only to covenants which run with the land. *Stokes v. Russell*, 3 T. R. 678; affirmed, 1 H. Bl. 562; *Pargeter v. Harris*, *supra*.

Of a similar nature is the question, who is the proper person to sue on the death of the lessor, owner in fee, for breaches of covenant which have accrued in his lifetime? It is laid down that where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial injury has taken place since his death, the heir, and not the executor, is the proper plaintiff. But the executor may sue for a breach of covenant during the testator's lifetime, grounded on the special damage thereby caused to the testator's personal estate; 2 Wms. Saund. 181 c, (h); *Kingdon v. Nottle*, 1 M. & S. 355; *Id. v. Id.*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188, Ex. Ch.; *Raymond v. Fitch*, 2 C. M. & R. 588, 598; or, even although there be no such special damage. *Ricketts v. Weaver*, 12 M. & W. 718. But, where the covenant does not run with the land, the executor alone can sue. *Raymond v. Fitch*, *supra*.

The rights of a mortgagor to sue are now governed by the J. Act, 1873, s. 25, (5), *ante*, p. 281.

Evidence on defence of assignment over of term by defendant.] In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned over the term before breach; for the assignee is only liable for those breaches which have occurred while he is assignee; *Taylor v. Shum*, 1 B. & P. 21; *Paul v. Nurse*, 8 B. & C. 486; but for those breaches he may be sued even after he has parted with the term. *Harley v. King*, 2 C. M. & R. 18. The assignee is not liable for breaches committed before the assignment to him. *S. Saviour's v. Smith*, 3 Burr. 1271; and see *Coward v. Gregory*, L. R., 2 C. P. 153. If the defence be traversed, the defendant must prove the assignment: that is, that the whole term has been legally transferred by him to another. The 8 & 9 Vict. c. 106, s. 3, requires that an assignment should be proved by an instrument under seal. But as an underlease by the defendant for the whole of his term amounts to an assignment; *Parmenter v. Webber*, 8 Taunt. 593; *Beardman v. Wilson*, L. R., 4 C. P. 57; and the above section allows leases not exceeding three years to be by parol, it follows that a good assignment of such a lease may be made by way of underlease, without deed or writing. Where the defendant proved that, although he had executed the assignment, it had not been delivered to his assignee, having remained in the hands of the defendant's solicitor, who had prepared it for, and by order of, the assignee, and who had a lien upon it, it was held sufficient. *Odell v. Wake*, 3 Camp. 394. It would be otherwise if delivered as an escrow, or rejected by the assignee. The defendant need not prove notice to the plaintiff of the assignment; *Pitcher v. Tovey*, 1 Salk. 81; 4 Mod. 71; nor the assent of the assignee to the assignment, for assent is presumed. *Leach v. Thompson*, 1 Show. 296; Freem. 2nd ed. 503, (b); see *Siggers v. Evans*, 5 E. & B. 367; 24 L. J., Q. B. 305; and *Hobson v. Thellusson*, L. R., 2 Q. B. 642. But his express refusal may, of course, be shown; and perhaps his incapacity to accept from infancy or some other cause. A reply that the assignment was fraudulent will not be supported by proof that the assignment was to a beggar in order to get rid of liability. *Lekeux v. Nash*, 2 Str. 1221; *Taylor v. Shum*, *supra*; *Onslow v. Corrie*, 2 Madd. 330. But if there was real fraud, as a secret trust for the benefit of the assignor it would probably defeat the defence, if such fraud were replied. See S. C.; *Hyam's case*, 1 D. F. & J. 75; 29 L. J., Ch. 243; *Ex parte Bunn*, 2 D. F. & J. 297; 31 L. J., Ch. 4; and *Ex parte Bugg*, 2 Dr. & Sm. 452; 35 L. J., Ch. 43.

An assignee who takes the demised premises from the lessee by indenture indorsed on the lease, "subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease," is not liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Wolveridge v. Stewart*, 1 Cr. & M. 644, Ex. Ch.

Evidence on defence traversing assignment to plaintiff.] Where the plaintiff sues as assignee of the reversion, and the defendant traverses the title as stated, it will be incumbent upon the plaintiff to prove it, by showing the mesne conveyances from the original lessor. See *Carrick v. Blagrove*, 1 B. & B. 531.

Where a lease, made by *cestui que trust* under a power in a settlement, with covenants for rent, &c., with the lessor and "his assigns," recited the equitable estate of the lessor, it was held that "assigns" meant assigns of the settlor, and that the assignee of the legal reversion, though not assignee of the lessor, was entitled to take advantage of the covenants and condition of re-entry; *Greenaway v. Hart*, 14 C. B. 340; 23 L. J., C. P. 115; and that the lessee was not estopped from disputing the lessor's title to sue. *Ib.* The question who are assignees of the reversion, so as to be entitled

to sue by virtue of the 32 Henry 8, c. 34, is usually decided upon the pleading.

The assignee of the reversion cannot sue for breaches of covenant which accrued before the assignment to him. *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117. And although 1 Vict. c. 26, s. 3, enacts that a right of entry for condition broken shall pass by will, yet this does not extend to an action on a covenant broken in the testator's lifetime.

Evidence under defence of surrender.] A surrender of a lease, such as could not be created without writing, must be by deed, 8 & 9 Vict. c. 106, s. 3, unless the surrender be by act and operation of law. The mere destruction of the sealed lease by consent of both parties was, at law, no surrender of the lease by operation of law; and debt lies for rent notwithstanding, for the estate is not divested. *Ward, Ld. v. Lumley*, 5 H. & N. 87; 29 L. J., Ex. 322.

As to what amounts to a surrender by act and operation of law, see *ante*, pp. 306, 307, and *Furnivall v. Grove*, 8 C. B., N. S. 456; 30 L. J. C. P. 3.

Evidence under defence of eviction.] An action of covenant for non-payment of rent can be defeated by proof of an eviction of the defendant from the premises in question, either by the lessor or one whose title is better than his. *Vide ante*, pp. 310, 311, where the cases as to what amounts to an eviction and the effect thereof are collected.

Where there has been an eviction, by title paramount, from part of the land demised, the lessor may sue the assignee of the lease in covenant for the apportioned part of the rent, because the action is brought on the privity of estate. *Stevenson v. Lambard*, 2 East, 575. But the court intimated that, in an action of covenant brought by the lessor against his lessee it would have been otherwise, as that action is founded on the privity of contract, citing Bro. Contract, pl. 16; Moor, 116. An eviction from part of the subject-matter of the lease was held to be no defence to an action for breaches of covenants to repair, and not to assign or underlet, it not appearing that the defendant had given up possession of the whole. *Hodgskin v. Queenborough*, Willes, 131, n. (b); *Newton v. Allin*, 1 Q. B. 518. And it would seem that the tenant, in such a case, cannot discharge himself from his liability to such covenants, by surrendering the residue of the premises, from which he has not been ousted to the landlord, if the latter refuse to accept possession of them. *Morrison v. Chadwick*, 7 C. B. 266.

Evidence on defence of bankruptcy of the plaintiff.] In an action of covenant for rent the defendant pleaded that the plaintiff became bankrupt after the rent was due. The plaintiff replied that he let the premises in question as trustee for a third person, and had no beneficial interest in the rent. It was held sufficient, under this replication, to show that the plaintiff had from time to time been in the habit of paying over the rent to the person who was stated to have the beneficial interest in the premises, and that there was no need of proving an express declaration of trust under the Statute of Frauds. *Houghton v. Kensington*, 18 C. B. 235; 25 L. J. C. P. 218.

Evidence where defendant is sued as assignee of the lessee.] Where an issue is taken upon the assignment it will be necessary to prove, either a transfer of the interest by deed, or facts from which an assignment may by law be inferred. Where the statement of claim states generally that the term has

vested in the defendant by assignment, it will be sufficient *prima facie* evidence to show that the defendant has paid rent as assignee, or is in possession of the premises. 2 Phill. Ev. 125; Peake, Ev., 5th ed., 284. Thus, where A. had been tenant of certain premises, and upon his leaving them, B. had taken possession, it was held that he might be presumed to come in as assignee of A., though he had never paid rent. *Doe d. Morris v. Williams*, 6 B. & C. 41. The jury may, however, decline to act upon such evidence, and find that there was no assignment in writing. *Paull v. Simpson*, 9 Q. B. 365. When the defendant has never entered or done anything to admit the assignment, his title may be proved by producing memorials of the mesne conveyances registered by parties under whom the defendant claims, after notice to the defendant to produce the originals. *Wollaston v. Hakevill*, 3 M. & Gr. 297. In this case it was decided that an executor who had not entered was liable as assignee, unless he discharged himself by pleading that he was no otherwise assignee than as executor, and that he had never entered into possession. Proof that the defendant is executor *de son tort* appears sufficient to impose upon him the liability of assignee. *Paull v. Simpson*, *supra*. But one who has occupied premises under an executor *de son tort*, without any legal assignment of the lease, would seem to be free from such liability, except perhaps where the substitution in the tenancy could be proved to be fraudulent. S. C. Where a person has entered into possession of, or received the rents and profits of, premises demised to an intestate, and paid the rent reserved thereon, he is estopped from denying that he is assignee of the term, even though he is not chargeable as executor *de son tort*. *Williams v. Heales*, L. R., 9 C. P. 177. Where a term has been assigned by way of mortgage it is not necessary, in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the mortgaged premises. *Williams v. Bosanquet*, 1 B. & B. 238. A trustee to whom a debtor's estate, including a lease, has been assigned for the benefit of creditors is liable as assignee if he do not repudiate the lease; see *White v. Hunt*, L. R., 6 Ex. 32, where the tenancy was from year to year.

Action against assignee of lease. Defence.] In answer to this action the defendant may prove that he is not an assignee of the whole term, but only an undertenant. *Holford v. Hatch*, 1 Doug. 183; *Derby, El. of v. Taylor*, 1 East, 502. If he is charged as assignee of all the estate in certain premises, and he is in fact an assignee of an undivided part of the premises only, he cannot plead this in bar to the action; *Merceron v. Dawson*, 5 B. & C. 479; as it amounted to a plea in abatement only; *Grattan v. Wall*, 1 R., 2 C. L. 484. By Rules, 1883, O. xxi., r. 20, "no defence shall be pleaded in abatement." As to the manner in which an objection, formerly pleaded in abatement, is now to be taken, *vide ante*, p. 87. The defendant is not chargeable as assignee of the land for the entire rent, if the assignment be of part only. *Curtis v. Spitty*, 1 N. C. 756. The defendant may show that he is only devisee of the equity of redemption, the legal estate being in the mortgagee; *Carlisle, Mayor of, v. Blamire*, 8 East, 487; or only appointee, and not liable as such on a covenant binding the assigns of the appointor. *Roach v. Wadham*, 6 East, 289.

Formerly many questions arose as to the effect of a lessee's bankruptcy on the covenants entered into by him in his lease; and much difficulty arose under the earlier bankruptcy acts as to whether the assignee had or had not accepted the lease so as to be liable on the covenants thereof. These questions do not, however, arise under the Bankruptcy Act, 1883, which is now in force. *Vide ante*, pp. 307, 308.

As to what covenants run with the land, so as to bind the assignees, see *Spencer's case*, 1 Smith's L. Cas. and notes.

Action for rent under indenture of demise.] The action may be in the form of debt for the rent reserved by the lease, or of covenant on the covenant to pay. In the former case, the cause of action does not in strictness fall in this place; but, for convenience, debt and covenant for rent are here treated of together. See also *Action for use and occupation*, *ante*, p. 303, under which title some of the proofs applicable to issues, which occur in this action, will be found.

An action lies by the lessor, or the grantee of his reversion against the lessee, on his express covenant to pay rent, notwithstanding he have assigned the lease, and the lessor, or his grantee have accepted the assignee as his tenant. 1 Wms. Saund. 240; 2 *Id.* 302, (5). But the lessor cannot, after he has parted with his reversion, bring an action of covenant for rent which accrued due after the grant of the reversion, the action can only be brought by the grantee of the reversion, for the stat. 32 Hen. 8, c. 34, has transferred the privity of contract together with the estate in the land to him. 1 Wms. Saund. 241 f, (6). But where the lessor has assigned his reversion, in a part only of the land, the lessee is liable to him on the covenant, for an apportioned rent, in respect of the residue of the land, although the lessee had assigned all his interest in the whole of the land. *Swansea, Mayor, &c. of, v. Thomas*, 10 Q. B. D. 48. The lessor may bring an action of debt against the assignee of the lessee by reason of the privity of estate; but debt will not lie against the original lessee, after the acceptance of the assignee by the lessor as his tenant, for this extinguishes the privity of contract which was created between them by the lease. 1 Wms. Saund. 241 b, (5); 2 *Id.* 302, (5); *Wadham v. Marlowe*, 8 East, 314, n; 1 H. Bl. 437.

In an action of debt for rent, the statement of claim states a demise at a certain rent, the entry or holding of the defendant, and the accruing of rent during a certain period. Sometimes the lease by indenture is set out, but it is not then the gist of the action; but it is of course a material part of the claim where the action is in covenant.

Under the J. Act, 1873, s. 25, (5), (*ante*, p. 281,) a mortgagor may sue for the rent of land mortgaged, which he is allowed by the mortgagee to enjoy.

Action for rent. Evidence on denial of the demise, &c.] When the lease is in the pleadings stated to be under seal, the contract is denied, and may be disproved under a defence denying the demise, or the execution of the deed.

Where the demise is denied, it may be proved by production and proof of a lease, executed by the plaintiff and accepted by the defendant, or by proof of the execution of it by the defendant, just as if the plaintiff had sued on the deed, and the defendant had denied execution; see 1 Wms. Saund. 276, (11); and *post*, *Action for recovery of land by landlord*, and *Action of replevin, — Tenancy of the plaintiff*. Where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms and the use of the furniture, it was held to be rightly stated according to the legal effect; for the rent could not issue out of the chattels. *Walsh v. Pemberton*, 1 Selw. N.P., 2nd ed. 640; *Farwell v. Dickenson*, 6 B. & C. 251. But if the demise is of a messuage and tithes, or of a messuage and of a licence to sport, reserving an entire rent, and is not under seal, an action cannot be maintained for the rent reserved if the defendant have entered only; for the incorporeal right cannot pass except by deed; *Gardiner v. Williamson*, 2 B. & Ad. 336; *Bird v. Higginson*, 6 Ad. & E. 824; but if the tenant have enjoyed the right for the term, he must then pay the rent agreed on. See *Thomas v. Fredricks*, 10 Q. B. 775; *Adams v. Clutterbuck*, 10 Q. B. D. 403.

Action for rent. Defence. Payment.] As to proof of payment, *vide ante*, pp. 312 and 615, *et seq.* The defendant may show payment to the plaintiff, or to another by his appointment; *Taylor v. Beal*, Cro. Eliz. 222; *Gilb. Ex.*

283; or, that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent; Gilb. on Debt, 443; but not that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary reparations; for this is only a cause of cross action; *Taylor v. Beal*, Cro. Eliz. 222; B. N. P. 177; and would therefore now be matter for counter-claim. But if the lessor direct the lessee to repair, and the lessee repair accordingly, the money so laid out may be evidence of payment. Gilb. on Debt, 442.

A compulsory payment of a charge upon the land may be recouped by the defendant out of his rent. *Dyer v. Bowley*, 2 Bing. 94, and cases cited *post*, tit. *Action of replevin*.—*Denial of rent being in arrear*. But the defence would require to be pleaded specially.

As to deductions from rent for property tax paid, *vide Action for use and occupation—Payment, ante*, p. 312.

Action for rent. Defence. Readiness to pay on the land.] It is a good defence in an action of debt for rent, that the defendant was on the premises demised ready to pay the rent at the time it became due, but the plaintiff was not there to receive it. *Crouch v. Fastolfe*, T. Raym. 418; see also *Tinckler v. Prentice*, 4 Taunt. 549. It was held bad in an action against the lessee on an express covenant to pay the rent. *Haldane v. Johnson*, 8 Exch. 689; 22 L. J., Ex. 264. But the defence would seem to be good in an action against an assignee of the lease, on a covenant to pay the rent, for such action is founded solely on privity of estate, and would therefore fall within the principle of *Crouch v. Fastolfe, supra*; see *per cur.* 8 Exch. 694, 695; 22 L. J., Ex. 265.

Action for rent. Defence. Statute of Limitations.] It has been decided that, where the demise is by indenture, the action for rent is now limited, by 3 & 4 Will. 4, c. 42, s. 3, to 20 years, and not, by 3 & 4 Will. 4, c. 27, s. 42, to 6 years only. See these statutes and the cases decided thereon, *ante*, p. 638, *et seq.*

Action for rent. Defence. Fraud. It seems that fraud will not avoid a contract whereby an estate in land has passed to the defendant. *Feret v. Hill*, 15 C. B. 207; 23 L. J., C. P. 185. It is a good equitable defence that plaintiff had, to his knowledge, no title to part of the land he purported to demise. *Mostyn v. W. Mostyn Coal & Iron Co.*, 1 C. P. D. 145.

Breach of covenant not to assign, &c.] On a covenant "not to assign, transfer, set over, or otherwise do or put away the indenture of demise, or the premises hereby demised, or any part thereof," it has been held that an underlease is no evidence of a breach, but that an assignment of the whole term must be proved. *Crusoe d. Blencowe v. Bugby*, 3 Wils. 234; see 1 Smith's Lead. Cas. 8th ed. 63. But, where the proviso was "not to set, let, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso. *Roe d. Gregson v. Harrison*, 2 T. R. 425; and, where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term;" it was held, that proof that the lessee had entered into partnership with A., and agreed that he should have the use of a back-room and other parts of the premises exclusively, was evidence of a forfeiture. *Roe d. Dingley v. Sales*, 1 M. & S. 297. An assignment by an assignee of a lease to his co-assignee is a breach of a covenant not to assign. *Varley v. Coppard*, L. R., 7 C. P. 505. But see hereon *Bristol, Cor. of v. Westcott*, 12 Ch. D. 461, 465, *per M. R.* Where a lease is granted to partners, B. & H., it is no breach of a covenant, not "to

part with the possession" of the premises, for H. to give up possession thereof to B. S. C., C. A. Taking a lodger is not a breach of a covenant not to underlet the house. *Doe d. Pitt v. Laming*, 4 Camp. 77; unless there be a distinct agreement for exclusive occupation of particular rooms. *Greenlade v. Tapscott*, 1 C. M. & R. 59, per Parke, B. See further as to the nature of a lodger's occupation, *sub tit. Action for Illegal Distress, post*.

On a covenant "not to let, assign, transfer, or otherwise part with the premises demised, or the lease," depositing the lease as a security is no breach. *Doe d. Pitt v. Hogg*, 4 D. & Ry. 226; *Doe d. Pitt v. Laming*, Ry. & M. 36. A lease contained a stipulation that for every acre, and so in proportion for a less quantity, of the land which the lessee should "suffer to be occupied" by any other person without the consent of the landlord, an additional rent should be paid; and the tenant undertook to "use, occupy," dress and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop, and it was proved to be the custom of the country for farmers to pursue that course: it was held, that the landlord was entitled to the additional rent, this being an occupation of the land by other persons. *Greenlade v. Tapscott, supra*. The lessee of a theatre, under a covenant not to grant, assign, or dispose of stalls or boxes "for a longer period than one year or season," let a box for a year, and then let it to another person in reversion for one year, commencing on a day certain in the following year or "such subsequent day during the year on which the theatre may be opened;" this was held to be no breach. *Croft v. Lumley*, 6 H. L. C. 672; 27 L. J., Q. B. 331.

A compulsory assignment by law is not a breach of a covenant not to assign. Thus the sale of a lease under a *bond fide* execution against the lessee is not a forfeiture of a condition not to assign. *Doe d. Mitchenson v. Carter*, 8 T. R. 57. But if the tenant give a warrant of attorney to his creditor, for the express purpose of enabling him to take the lease in execution, it will be a fraud, and a breach of the condition. S. C. *Id.* 300. So, an assignment under a commission of bankruptcy was no breach of a covenant not to assign. *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353. But, an assignment of the whole of the debtor's personal property, registered under the Bankruptcy Act, 1861, s. 192, was a breach of the covenant. *Holland v. Cole*, 1 H. & C. 67; 31 L. J., Ex. 481; and see *Doe d. Cheere v. Smith*, 5 Taunt. 795. An assignment, operating as an act of bankruptcy, and therefore void, will not be a breach of the covenant. *Doe d. Lloyd v. Powell*, 5 B. & C. 308. Where the covenant binds the lessee "and his assigns" not to assign over without licence, the compulsory assignment, by bankruptcy, will not discharge the covenant in the hands of subsequent voluntary assignees. See *Winter v. Dumergue*, 14 W. R. 281, M. T. 1865, C. P.; S. C. in Ex. Ch., *Id.* 699, E. T. 1866. So, although the devolution on an executor is not a breach of the covenant, yet if executors are named therein, the executor cannot assign without licence. *Roe d. Gregson v. Harrison*, 2 T. R. 425. Whether a devise by will is a breach of a covenant not to assign seems to be an unsettled question: Shep. Touch. 144. *For v. Swann*, Styles, 482; *Crusoe d. Blencowe v. Bugby*, 3 Wils. 237; *Doe d. Goodbehere v. Bevan*, 3 M. & S. 361; *Doe d. Evans v. Evans*, 9 Ad. & E. 719.

A covenant not to assign, where the assigns are named, binds the assignee of the lessee, although the assignment was made without the required licence; *Williams v. Earle*, L. R., 3 Q. B. 739; but it is only the assignee of the whole term that is bound, and if the lessee parts with the possession of the premises to A. under a licence to assign to A., but the assignment is never perfected, A. commits no forfeiture by assigning and giving up possession to B. without licence. *West v. Dobb*, L. R., 4 Q. B. 634; Ex. Ch., L. R. 5 Q. B. 460.

A covenant not to assign without the consent of the lessor, "such consent not being arbitrarily withheld," does not amount to a covenant by the lessor, but qualifies the lessee's covenant, so that if the lessor arbitrarily withhold his consent, the lessee may assign without any breach of covenant. *Sear v. House Property & Investment Soc.*, 16 Ch. D. 387; *Treloar v. Bigge*, L. R., 9 Ex. 147. It seems that a refusal "upon advice," though without stating the grounds, is not "arbitrary," and that to be such, it must be "unfair and unreasonable." *S. C. Id.* 155, *per Kelly, C. B.*, and Pollock, B. So where consent was not to be withheld from assignment "to any responsible and respectable person," an assignment to such a person is no breach. *Hyde v. Warden*, 3 Ex. D. 72, C. A. Where a lease contains a condition against sub-letting, &c., without the lessor's consent, and a sub-lease is granted with such consent to B., B. is under no restriction as to parting with his possession of the land so demised to him. *Williamson v. Williamson*, L. R., 9 Ch. 729.

To prove the breach of a covenant not to assign or underlet, *Ld. Alvanley* held it to be *prima facie* sufficient to show that a stranger was in possession of the premises, apparently as a tenant, and that on inquiry such stranger said he rented the house. *Doe d. Hindly v. Rickaby*, 5 Esp. 4. But on a covenant "not to assign, set over, or otherwise let," *Ld. Ellenborough* held that evidence that a stranger was in possession of the premises, with his name on the door, and that he said he had taken the premises from another stranger, was not sufficient; for *non constat* that the party in possession was not a tortious intruder. *Doe v. Payne*, 1 Stark. 86. According to *Doe d. Morris v. Williams*, 6 B. & C. 41, *ante*, p. 645, mere possession would seem to be evidence of an assignment.

The measure of damages in an action for a breach of a covenant not to assign, &c., is such a sum of money as will put the plaintiff in the same position as if the covenant had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability. *Williams v. Earle*, *ante*, p. 648. As a right of re-entry is commonly annexed to this covenant, its effect is more likely to come into question in an action for the recovery of land than in an action of covenant.

Breach of covenant as to trade on premises.] A covenant not to use a building "as a public-house for the sale of beer, wine, malt liquors or spirits," *Pearse v. Coats*, L. R., 2 Eq. 689; or "as a beerhouse, inn, or public-house for the sale of spirituous liquors," *L. & N. W. Ry. Co., v. Garnett*, L. R., 9 Eq. 26; *Holt v. Collyer*, 16 Ch. D. 718; is not broken by the sale of beer by retail under a licence "not to be drunk on the premises," for "beerhouse" means a house for the sale of beer to be consumed on the premises, S. CC. Nor is a covenant entered into in 1854, that "the trade or calling of an hotel or tavern keeper, publican, or beer shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," should not be carried on on the premises, broken by the sale of wine in bottle by a grocer in the ordinary course of his trade; for the covenant is directed against the trade of a gin palace, and not that of a wine merchant. *Jones v. Bone*, L. R., 9 Eq. 674. But, where the covenant was not to use the building, "as an inn, public-house or tap-room, or for the sale of spirituous liquors or ale or beer," it was held that although the covenant did not prevent the sale of wine, it extended to the sale by a grocer of spirituous liquors in bottle. *Fielden v. Slater*, L. R. 7 Eq. 523. So a covenant not to use the premises "as a beershop or public-house," is broken by the sale by a grocer of beer not to be consumed on the premises, for "beer shop" means any place where beer is sold. *S. Albans, Bp. of, v. Battersby*, 3 Q. B. D. 359; *accord. L. & Suburban Land & Building Co. v. Field*, 16 Ch. D. 645, C. A.

A covenant that the plaintiff "should have the exclusive right of supplying all ale, &c., which might be consumed in any house, &c., which might be erected on the land (conveyed), and which should be opened or used as an inn, &c.," is equivalent to a negative covenant that no other person than the plaintiff shall supply ale, &c. *Catt v. Tourle*, L. R., 4 Ch. 654. Such a covenant is conditional on the plaintiff being willing to supply the defendant with good marketable ale, &c., at reasonable prices. *Luker v. Dennis*, 7 Ch. D. 227; see also *Edwick v. Hawkes*, 18 Ch. D. 199.

A covenant not to use or exercise "any public trade or business" in a house, and that it should "be used and occupied as a private dwelling-house only" is broken by opening a school thereon. *Wickenden v. Webster*, 6 E. & B. 387; 25 L. J., Q. B. 264; *German v. Chapman*, 7 Ch. D. 271. So a covenant not to carry on, or permit to be carried on, any trade or business of any description whatsoever, is broken by opening thereon a charitable institution in which working girls are lodged and boarded; *Rolls v. Miller*, 25 Ch. D. 206, even although gratuitously, *Id.*, W. N., 1884, p. 69; or a hospital where the patients make small payments. *Bramwell v. Laing*, 10 Ch. D. 691. But a covenant not to do anything on land that may be a nuisance to the occupiers of the adjoining premises is not broken by opening a national school thereon. *Harrison v. Good*, L. R., 11 Eq. 338.

As to waiver by plaintiff of his right to an injunction, by his acquiescence in breaches of similar covenants, by tenants of other plots on the same estate. *Peck v. Matthews*, L. R., 3 Eq. 515; *German v. Chapman*, *supra*.

Breach of covenants for good husbandry, &c.] The proof of any act which, according to the natural and ordinary meaning of their words, is forbidden by these covenants, will entitle the plaintiff to a verdict. If the breach alleges that the defendant did not use the farm in a husbandlike manner, "but, on the contrary, committed waste," the plaintiff is bound to prove waste. *Harris v. Mantle*, 3 T. R. 307. See *post*, p. 659, and *Edge v. Pembrerton*, 12 M. & W. 187, cited *post*, p. 654. Where the breach is for bad husbandry, and the particulars delivered rely on non-cultivation, the plaintiff cannot show mere bad cultivation. *Doe d. Winnall v. Broad*, 2 M. & Gr. 523. But in such cases as these, the judge would probably now amend the breach or the particulars. A judge, however, will not amend, as of course, if the amendment will only entitle to nominal damages for a breach, which defendant probably would not have contested. *Times Insurance Co. v. Hawke*, 28 L. J., Ex. 317. A covenant to spend on the farm all manure collected on it, extends to manure made by the cattle of strangers not fed on the farm, but turned on by a temporary licence. *Hindle v. Pollitt*, 6 M. & W. 529. A covenant by the tenant in a farm lease, that he would not "during the last year of the said term thereby granted, sell or remove from the said farm and lands any of the hay, straw, and fodder which should arise and grow on the said farm," extends to all hay, &c., which had grown on the land at any time during the term. *Gale v. Bates*, 3 H. & C. 84; 33 L. J., Ex. 235.

We have seen, *ante*, p. 25, that husbandry covenants may be controlled or explained by proof of custom not expressly or impliedly excluded by the covenant. See also *ante*, pp. 316, 317. Such customs apply to leases under seal as well as by parol. *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's Lead. Cases. But the course of pleading on covenants will sometimes require that the custom should be pleaded by the defendant, except where it is only used to explain the covenant. In a covenant to pay a penal rent for using land otherwise than for pasture or meadow, it is for the jury to say whether the use of it as a race-course was in fact incompatible with the covenant. *Semb. Aldridge v. Howard*, 4 M. & Gr. 921. A covenant that

the tenant will when required perform each year for the landlord a certain amount of team-work, gives the landlord a right to team-work generally, and not merely for agricultural purposes. *Marlborough, Dk. of, v. Osborne*, 5 B. & S. 67; 33 L. J., Q. B. 148.

A covenant not to sell or carry away from the demised premises any hay, straw, &c., grown or produced there, without the consent in writing of the plaintiff first had and obtained, under the increased rent of 10*l.* for every ton so given, sold, or carried away, was held to give the tenant a right to remove hay, straw, &c., upon paying the increased rent. *Legh v. Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25.

If a lease provides that the tenant shall not cut down nor lop trees under a penalty of 20*l.* for each tree cut or lopped, the lessor, upon breach, may proceed either for the penalty, or for unliquidated damages; in the latter case the jury are not bound to give the whole penalty. *Hurst v. Hurst*, 4 Exch. 571.

When there was a lease reserving yearly rent, payable on half-yearly days, and a further rent, payable on the same days, for every acre converted into tillage without licence, or planted with rape, woad or potatoes, or from which successive crops should be taken, without summer fallows, &c., it was held that, after one breach of covenant, the increased rent attached and continued to the end of the term. *Bowers v. Nixon*, 12 Q. B. 558, n., affirm. in error. A covenant not to take more than two crops during four years, means any four years, and not each succeeding four years reckoning from taking the lease. *Fleming v. Snook*, 5 Beav. 250. Where the grantee H., of the right of sporting over certain lands in the occupation of R. covenanted with the grantor W. to keep down the rabbits "so that no appreciable damage may be done to the crops thereon," it was held that W. being under no liability to compensate R. for injury done to the crops, by breach of the covenant, could only recover nominal damages therefor from H. *West v. Houghton*, 4 C. P. D. 197.

Breach of covenant to insure.] The covenant to insure has always been construed strictly in courts of common law. As to the onus of proof in actions for not insuring, see cases cited *ante*, *Onus Probandi*, p. 90. The covenant, however, usually provides some mode of proof, as that the lessee shall produce his policy when required. In *Doe d. Darlington v. Ulph*, 13 Q. B. 204, where there was a covenant "to insure at all times previously to the expiration of the term thereby granted," and the lessee did not effect an insurance till a month after the creation of the term, it was held, that in the absence of evidence to explain this delay, the plaintiff was entitled to a verdict, and that the jury ought not to be asked whether the insurance was effected within a reasonable time. *Semble*, if the lessee had insured the premises shortly after the execution of the lease, he would have complied with his covenant. *Id. per* Pattison, J. In *Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329, the omission to insure had been repeatedly confessed by the tenant, who excused himself by saying that he could not afford the insurance. As he appeared to be no richer at the time of issuing the writ, it was held that there was some evidence to go to the jury of the breach.

If the covenant is to insure in the name of A., it is a breach to insure in the joint names of A. and the lessee. *Penniall v. Harborne*, 11 Q. B. 368. But see *Havens v. Middleton*, 10 Hare, 641; 22 L. J., Ch. 746.

A covenant to keep buildings insured against fire runs with the land, for the stat. 14 Geo. 3, c. 78, s. 83, enables the landlord to have the insurance money laid out in reinstating the premises, so that the covenant, with the aid of the statute, amounts to a covenant to repair. *Vernon v.*

Smith, 5 B. & A. 1. The operation of this section has been held to be general, and not to be confined to the metropolitan district. *Ex pte. Goring*, 34 L. J., Bky. 1.

Breach of covenant to repair.] As to buildings then erected, a covenant to repair, or put in repair, or deliver up in repair, runs with land, and binds assignees though not named in it. *Martyn v. Cluc*, 18 Q. B. 661; 22 L. J. Q. B. 147. The assignee of a lease is not liable, on a general covenant, to repair buildings erected during the term, unless assigns are named in it. *Spencer's case*, 5 Rep. 61; *Bally v. Wells*, 3 Wils. 25; *Doughty v. Barnard*, 11 Q. B. 444. *Contra*, *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J., Ex. 194; but this case was decided on a misapprehension of *Spencer's case* (see notes thereto in 1 *Smith's Lead. Cas.*, 8th ed. 80, *et seq.*), and has been much disapproved. In *Cornish v. Cleife*, 3 H. & C. 446; 34 L. J., Ex. 19, a covenant in a demise of three houses and a field, "well and sufficiently to repair, sustain and keep the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings, &c., during the term; was held not to extend to houses erected during the term in the field. This case agrees with the ruling in *Doe d. Worcester School, &c. Trustees v. Ronlunds*, 9 C. & P. 734; but is clearly inconsistent with the decision in *Brown v. Blunden*, Skin. 121; and the opinions of the judges expressed in *Darcy v. Ashwith*, Hob. 234; and *Dowse v. Earle*, 3 L. 265; *S. C. sub nom. Dowse v. Call*, 2 Vent. 128, cited in *Bac. Abr. Covenant* (F).

A covenant to keep a house in repair is satisfied by keeping it in substantial repair according to the nature of the building; and with a view to determine the sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise. *Stanley v. Tourgood*, 3 N. C. 4; *accord. Mantz v. Goring*, 4 N. C. 451. It has been said that such a covenant did not mean that the house should be delivered up in an improved state, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care; *Gutteridge v. Munyard*, 1 M. & Rob. 334; and that accordingly on an issue as to the amount of damages for not keeping in repair, the bad state of the premises when demised was legitimate evidence for the defendant. *Burdett v. Withers*, 7 Ad. & E. 136. See also *Walker v. Hatton*, 10 M. & W. 249; *Martyn v. Cluc*, 18 Q. B. 661, 674. But, in *Payne v. Haine*, 16 M. & W. 541, a tenant under such covenant was held bound to put in repair; though the nature of the repairs ought to be measured by the age and class of the demised premises. In *Easton v. Pratt*, 2 H. & C. 683; 33 L. J., Ex. 233, Ex. Ch., it was held that a lease, whereby the lessee covenanted that he would "well and sufficiently repair, uphold, support, paint, maintain, amend and keep" the demised premises, and the said premises "so well and sufficiently repaired," &c., at the expiration of the term surrender, was a "repairing lease," on the ground that "whatever was the state of the premises at the time of the demise, the tenant would be bound under this covenant to put the premises into, and keep the premises in, a state of good and sufficient repair. *Payne v. Haine* (*supra*) is an authority on this point;" 33 L. J., Ex. 235; the report in 2 H. & C. 667 is to the same effect. *Accord. Saner v. Bilton*, 7 Ch. D. 815; *Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251, C. A. See also *Inglis v. Buttery*, 3 Ap. Ca. 552, D. P. But the tenant under such a covenant is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan, or the like. *Soward v. Leggatt*, 7 C. & P. 613. And a lessee under a covenant to put in repair, or to keep in repair, is not bound in either case to substitute new buildings for old. *Belcher v. McIntosh*, 2

M. & Rob. 186. And where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. ; Fitz. Ab. Cov. 4 ; Shep. Touch. 169 ; *Johnson v. S. Peter, Hereford*, 4 Ad. & E. 520. The lessee, under the ordinary covenant to keep in repair, is not bound to repair damage done before the lease was executed, though since the date fixed by the habendum for the beginning of the term. *Shaw v. Kay*, 1 Exch. 412.

On a covenant to repair, it is not sufficient evidence of a breach, to show that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time after. Shep. Touch. 173. Where the defendant pleads that he was always ready to repair, but a reasonable time had not elapsed, and issue is taken thereon ; proof that the defendant absolutely refused to repair entitles the plaintiff to a verdict. *Green v. Eales*, 2 Q. B. 225. Where the damage was alleged to be occasioned by the defendant's neglect to repair and "from no other cause," it was held sufficient to show that the premises became insecure by the removal of an adjoining wall by a third party, and that the defendant did not set about the repair in time to prevent the mischief consequent on such removal. S. C. If the lessee is bound to repair and leave the house in the same plight as he found it, and it is burnt by sparks from the chimney of the lessor's house near, it is said that the lessee is excused from rebuilding, for this is caused by the act of the lessor himself. 1 Rol. Ab. 454, pl. 8. This decision might be right if the fire could be treated as the direct act of the lessor ; as however the remedy by the lessee against the lessor would be in case for negligence, it is difficult to see how it can be supported, except on the ground of avoiding circuity of action. The lessee could now however counter-claim against the lessor.

Where the premises have passed through successive hands, it is sometimes not easy to prove in whose hands the want of repair occurred, and each assignee is liable to the lessor for his own default only. But where the plaintiff, a lessee under covenant to repair, assigned over to defendant, who assigned to B., who assigned to C., &c., and the plaintiff, being then obliged to pay damages for non-repair to the ground landlord, sued defendant for the amount, there being evidence of want of repair while in the hands of one of defendant's assignees : it was held, that the plaintiff was entitled to substantial, and not nominal, damages, without showing the exact amount of non-repair attributable to the defendant himself. *Smith v. Peat*, 9 Exch. 161 ; 23 L. J., Ex. 84. A lessee, under covenant to deliver up certain fixtures at the end of his term, on the 1st of April, remained in possession till the 10th, when possession was demanded by the lessor, and on the 13th he bought the title of a mortgagee of the lessor and refused to re-deliver : held, that the lessor was entitled only to damage for the detention of the fixtures between the 10th and 13th and not to the full value of them. *Watson v. Lane*, 11 Exch. 769 ; 25 L. J., Ex. 101. The breach of a covenant to put premises in repair is not a continuing breach. *Coward v. Gregory*, L. R., 2 C. P. 153. See, however, *Martyn v. Chue*, 18 Q. B. 661 ; 22 L. J., Q. B. 147.

Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired. *Luzmore v. Robson*, 1 B. & A. 584. In the case of *Marriott v. Cotton*, 2 Car. & K. 533, Rolfe, B. directed the jury that nominal damages only could be recovered in such an action, for the lessor (as he said) might pocket the damages and leave the premises unrepaired, and so oblige the lessee to repair them for his own convenience ; but the

Ct. of Q. B. held the direction wrong, and a verdict was subsequently entered for substantial damages; see *Bell v. Hayden*, 9 Ir. C. L. R. 301, 303, per O'Brien, J.; *Smith v. Peat*, ante, p. 653. The proper measure of damages is the diminution to the value of the reversion at the time of action. *Doe d. Worcester School, &c. Trustees v. Rowlands*, 9 C. & P. 734; *Bell v. Hayden*, supra; *Mills v. E. London Union*, L. R., 8 C. P. 79; *Williams v. Williams*, L. R., 9 C. P. 659. In this last case it was held that where the landlord had himself repaired the premises before action, he could not recover more than nominal damages; *sed quere*. Where, however, the above-mentioned measure of damages is inapplicable, such diminution of value is not the only test; thus, the lessor may sue, though he has forfeited his reversion by the entry of the ground landlord for the breach, and the test is what will be the cost of repair. *Davies v. Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113. This is indeed the general rule laid down by Ld. Holt in *Vivian v. Champion*, 2 Ld. Raym. 1125, and was approved by the court in *Davies v. Underwood*, supra, but was not followed in *Mills v. E. London Union*, supra. See also *Ravelings v. Morgan*, 18 C. B., N. S. 776; 34 L. J., C. P. 185. Where an action was brought for non-repair of premises, demised by the plaintiff to the defendant, the defendant being bound to repair and insure, and the jury found that the premises, which had been burnt down, would cost 1,600*l.* to rebuild, and that this would exceed by 600*l.* the value of the old premises as assigned, the court held that 1,000*l.* was the measure of damage. *Yates v. Dunster*, 11 Exch. 15; 24 L. J., Ex. 226. If a second action be brought on a covenant to keep premises in repair, the verdict recovered in the former action may be proved in mitigation of damages, but is not pleadable in bar. *Coward v. Gregory*, L. R., 2 C. P. 153. See further on the measure of damages on repairing covenants, *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J., Ex. 194; and Mayne on Damages, 3rd ed. pp. 299, et seq.

Breaking a doorway through the wall of the demised house amounts to a breach of a covenant to keep in repair; *Doe d. Vickery v. Jackson*, 2 Stark. 293. A lessee covenanted to repair, uphold, support, sustain, maintain, &c., all the houses and brick walls. Pulling down a brick wall dividing the courtyard in front from another yard at the side was held a breach of the covenant. *Doe d. Wetherall v. Bird*, 6 C. & P. 195. But, a mere covenant to repair is not broken by alterations and improvements where they are evidently contemplated by the lease; as where a private dwelling-house is demised by lease containing a covenant to repair the premises and all such buildings, "improvements and additions," as should be made thereupon by the lessee. *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; see also *Doherty v. Allman*, 3 Ap. Ca. 709, D. P. A covenant to deliver all "windows" then or thereafter affixed or belonging to the premises, extends to a plate-glass shop window put up by the lessee, so as to be movable without screws, nails, or glue, and fastened only by wedges. *Burt v. Haslett*, 25 L. J., C. P. 201; Ex. Ch., 18 C. B. 893; 25 L. J., C. P. 295. On a covenant to repair, the breach alleged that defendant did not repair, "but on the contrary permitted the premises to be ruinous for want of repair." Held that plaintiff must show permissive and not voluntary waste. *Edge v. Pemberton*, 12 M. & W. 187.

Where the lessee is obliged to repair in consequence of his lessor's refusal to do so, he cannot recover the expense of finding other premises for use during the repairs. *Green v. Eales*, 2 Q. B. 225. A lessee, who underlets with covenants to repair in the same terms as in his own lease, is not necessarily entitled to recover from the under-lessee the cost of an action for non-repair brought against himself; for though the covenants of the lessee and under-lessee may be in words the same, they are, in substance, different if

entered into at different times. *Walker v. Hatton*, 10 M. & W. 249. This case was decided on the ground that a covenant to repair is to be construed with reference to the state of the premises when it began to operate; and this ground is no doubt a sound one if by "state of the premises" is meant their age, and not their state of repair, for the lessee's liability under a repairing lease is not dependent on the state of repair in which the premises were at the time of the demise. *Easton v. Pratt*, 2 H. & C. 683; 33 L. J., Ex. 233, Ex. Ch., cited *ante*, p. 652. But, the lessee may recover the amount of dilapidations recovered against himself, and occasioned by the under-lessee's neglect. *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, *supra*. And he may recover the costs of such action, if he has given notice of it to the under-lessee, and received his sanction for defending it: and his sanction may be inferred if he does not prohibit the defence. *Semb. Blythe v. Smith*, 5 M. & Gr. 405, 412-3; and see *Rolph v. Crouch*, cited *post*, p. 659. And where the under-lessee A. contracted with the lessee B. to perform the covenants of the superior lease, A. is under a contract to indemnify B., and is, without such sanction, liable to B. for the costs of an action brought against B., by the superior landlord, and reasonably defended. *Hornby v. Cardwell*, 8 Q. B. D. 329, *per* Brett and Cotton, L.JJ. The lessee cannot recover from his under-lessee, as special damage, the value of a lease forfeited for non-repair, unless it appears that the forfeiture was solely owing to the under-lessee's non-repair. *Clow v. Brogden*, 2 M. & Gr. 39. Where A. demised to the plaintiff with special covenants to repair and insure, and the plaintiff underlet to the defendant with like covenants, and A. afterwards recovered possession for breach of the plaintiff's covenant, it was held that the plaintiff could not in an action of covenant against the defendant, recover damages for the loss of his beneficial reversion in the term; for the term was forfeited for the breach, not of the defendant's covenants, but of the plaintiff's covenants, and there was no covenant by defendant to indemnify. *Logan v. Hall*, 4 C. B. 598.

Where the defendant covenanted to keep the demised premises in repair, the same being first put into repair by the landlord, it was held that the repairing by the landlord was a condition precedent to the defendant's obligation on his covenant. *Neale v. Ratcliffe*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Coward v. Gregory*, L. R., 2 C. P. 153. A lessor cannot be sued on a covenant to keep demised premises in repair, unless he has had notice of the want of repair. *Makin v. Watkinson*, L. R., 6 Ex. 25; *Manchester Bonded Warehouse Co. v. Curr*, 5 C. P. D. 507. Such a covenant implies a licence to the landlord to go on the land, for a reasonable time, to effect the repairs requisite. *Saner v. Bilton*, 7 Ch. D. 815. Where the covenant is to repair, the defendant being allowed rough timber by the lessor, the general averment by the plaintiff (lessor) of readiness to supply, &c., will not oblige him to show that he has cut down and prepared timber, defendant not having required him to do so. *Semb. Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147. An agreement by the landlord to put a building in good tenantable repair is satisfied if it is in such repair when the tenant takes possession, and he does so without objection, although in fact the repairs prove insufficient to strengthen the building sufficiently for the particular purpose to which the tenant applies it. *McClure v. Little*, 19 L. T., N. S. 287, M. T. 1868, Ex. See *Saner v. Bilton*, *supra*.

A covenant by lessor to keep premises in proper condition for storing cartridges has reference only to the physical condition of the premises. *Newby v. Sharpe*, 8 Ch. D. 39, C. A.

Breach of covenant to pay rates and taxes.] This covenant seems to extend to subsequently-imposed taxes of the same nature as those in existence

at the time of the covenant, but not to taxes of a different nature : see *Baxter v. Kitchell*, 1 Salk. 198 ; 1 Id. Raym. 317. In this case the covenant was to pay a rent-charge, without deducting any taxes. A covenant to pay the rent without "any deduction, defalcation, or abatement" ; *Bradburn v. Wright*, 2 Doug. 624 ; or an agreement to pay all taxes ; *Amfield v. W. Ry. & M.* 246, obliges the tenant to pay the land tax. A parliamentary rate is one imposed directly by act of parliament. *Palmer v. Earith*, 14 M. & W. 428, per Parke, B. A sewers rate did not fall within a covenant of that description. S. C. See also *Baker v. Greenhill*, 3 Q. B. 148. A covenant to pay all taxes and assessments, except "the level tax, property tax, and land tax," was held not to include the tithe rent charge of which the lessor was owner. *Jeffrey v. Neale*, L. R., 6 C. P. 240.

Covenants to pay taxes, &c., are frequently so framed as not to be limited in their application to the usual annual assessments made, but to extend to sums levied for the permanent improvement of the premises. How far they so extend, depends on the construction of the covenant in each case. *Budd v. Marshall*, 5 C. P. D. 490, per Baggallay, L. J. Thus, the words "all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter" chargeable on the said lands demised, were held to include an extraordinary assessment made by commissioners of sewers for a work of permanent benefit on the land. *Waller v. Andrews*, 3 M. & W. 312. So, a covenant to pay rent, "free and clear of and from all manner of parliamentary, parochial, and other taxes, rates and assessments, deductions, or abatements whatsoever," was held to include the expense of paving footways, adjoining the houses, which paving was done under a local act requiring the expense to be paid primarily by the tenants, and empowering them to deduct from their landlord's rent the sum so paid by them. *Payne v. Burrridge*, 12 M. & W. 727. So, a covenant "to pay and discharge all taxes, rates, duties and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised, in respect thereof," was held to include the sum which the vestry had compelled the owner to pay them under the provisions of the Metropolitan Management Acts, 1856, 1862, as the proportionate part of the expense of paving the adjoining street under those acts. *Thompson v. Lapworth*, L. R., 3 C. P. 149. *Hartley v. Hudson*, 4 C. P. D. 367 (decided under the Public Health Act, 1848, 1875), is to the same effect. So, where the tenant covenanted to "bear, pay and discharge" "all other taxes, rates, duties and assessments whatsoever," which should be charged "on the said premises or any part thereof, or upon the landlord or tenant in respect thereof, or in respect of the said yearly rent ;" *Budd v. Marshall*, 5 C. P. D. 481, C. A. (Public Health Act, 1875), or, "all burthens, duties and services ;" *Sweet v. Seager*, 2 C. B., N. S. 119 (Metropolis Management Act, 1856), or, "all taxes, rates, assessments and outgoings whatsoever," "imposed upon the said demised premises," or "upon the landlord or tenant in respect thereof or on the rent thereby reserved ;" *Crosse v. Raw*, L. R., 9 Ex. 209 (Sanitary Act, 1866, s. 10). See also *Middleley v. Coppock*, 4 Ex. D. 309, C. A. (decided between vendor and purchaser).

But under a covenant to pay "rates and assessments which whether parliamentary, parochial, or otherwise now are or at any time during the said term shall be taxed, rated, charged, assessed, or imposed upon the said premises or any part thereof, or upon or payable by the occupier or tenant in respect thereof," it was held that a charge similar to that in *Thompson v. Lapworth*, *supra*, must be borne by the landlord, as it was imposed on him in respect of the premises, and the tenant did not, by his covenant, relieve the landlord of this burthen. *Allum v. Dickinson*, 9 Q. B. D. 632, C. A. The decision in *Tidswell v. Whitworth*, L. R., 2 C. P. 326, decided on a local act.

is to the same effect. See this case explained in *Thompson v. Lapworth*, L. R., 3 C. P. 149, 159. So, under a similar covenant, the lessor was held bound to bear the cost of work done by him under an order made on him under the Public Health Act, 1875, s. 94. *Rawlins v. Briggs*, 3 C. P. D. 368. See also *Bird v. Elwes*, L. R., 3 Ex. 225.

The principle to be deduced from the above cases may be shortly summarized as follows. Where the covenant includes only an obligation to make money payments, to the local or other authorities, then, although the tenant is liable to reimburse the owner, when the duty is primarily to pay money to the authorities (as in *Waller v. Andrews*, *Payne v. Burrigge*, *Thompson v. Lapworth*, and *Hartley v. Hudson*, ante, p. 656), yet he is not liable, where the owner is primarily bound to do the work himself, and it is only on his default, that the authority could do the work and assess him (as in *Budd v. Marshall*, *Tidswell v. Whitworth*, ante, p. 656, and *Rawlins v. Briggs*, supra). The covenants may, however, be wide enough to cover the obligation to do work at the instance of the local authority; *Allum v. Dickinson*, *Sweet v. Seager*, and *Crosse v. Raw*, ante, p. 656; a covenant to pay all "duties," or "outgoings" being sufficient for this purpose; S. CC. As to the construction of a covenant to pay rates on mines levied under the Rating Act, 1874, see *Chaloner v. Bolckow*, 3 Ap. Ca. 933, D. P.

An absolute covenant to pay rates is broken on non-payment, although no demand has been made on the tenant for payment. *Davis v. Burrell*, 10 C. B. 821.

Where the lessor covenants with the lessee, to pay all rates and taxes already charged, or to be charged on the premises, he is liable to pay them only on the rent reserved, and not on the full improved value of the premises *Watson v. Home*, 7 B. & C. 286; *Smith v. Humble*, 15 C. B. 321.

[Breach of covenant for title.] The covenants for title, on which remedies are sought in the courts of common law, are principally the covenant that the grantor is seised in fee, or has power to convey; and the covenant for quiet enjoyment express or implied, and freedom from incumbrances. By the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 7, in the case of conveyances on sale, mortgage, or settlement, or by a trustee, mortgagee, &c., executed after 31st December, 1881, the respective covenants, which were usually inserted in such instruments, are now implied. By sect. 7 (7) such covenants may be varied, or extended by the instrument. The statement of claim alleges, by way of breach, that the defendant was not seised, or had not power, &c., at the time of the conveyance, or that some person who before and at the time of the conveyance by the defendant had, and still has, lawful right to the premises, &c., entered and evicted the plaintiff: or that the entry or other disturbance was by or under the defendant himself.

Proof that the defendant is in as heir of the lessor is sufficient to charge him as assignee of the reversion of a lease. *Derisley v. Custance*, 4 T. R. 75. See post, Part III., *Action against heir and devisee*.

There seems to be some doubt as to how far the breach of a covenant for title is continuing in its nature. It has been recently held that where A. conveys land to B., his heirs and assigns, and covenants with them for title, and B. conveys the land to C., C. cannot sue A. in respect of an incumbrance affecting the land prior to the latter conveyance. *Spoor v. Green*, L. R. 9 Ex. 99. But this decision is hardly consistent with the cases of *Kingdon v. Nottle*, 4 M. & S. 53, and *King v. Jones*, Id. 118, cited ante, p. 642. In *Spoor v. Green*, supra, the incumbrance affecting the land, was a mining lease granted by A., prior to the conveyance to B., and it was held that the breach was complete at the time of the conveyance to B., and that no fresh cause of

action arose on the subsequent subsidence of the surface, owing to the working of the mines prior to the conveyance to C. Where the covenant was of seisin in fee, and the premises were, in fact, copyhold of inheritance, the jury ought to find as damage the difference in value between lands of free tenure. *Gray v. Briscoe*, Noy, 142.

On a covenant for quiet enjoyment generally, it will not support the breach to show a *tortious* disturbance by a stranger; for it is only a covenant against persons having lawful title. *Dudley v. Folliott*, 3 T. R. 587; 2 Wms. Saund. 178, (8); unless the covenant is against disturbance by a particular person, when it is sufficient to show any disturbance by him, whether by lawful title or otherwise. *Nash v. Palmer*, 5 M. & S. 374. So, where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to show any disturbance by him or them. *Forte v. Fort*, 2 Roll. Rep. 21; 1 Wms. Saund. 181 b, (g). Thus, where the lessor lets a seam of coal with covenant for enjoyment without molestation, &c., and he afterwards works minerals in the stratum above the coal, so as to damage the coal mine, an action lies for breach of covenant; though a mere nuisance by the lessor on his own land is not necessarily a breach of such a covenant. *Shaw v. Stenton*, 2 H. & N. 858; 27 L. J., Ex. 253. See further *Spoor v. Green*, ante, p. 657. Where the covenant is for quiet enjoyment against A. and any other person by his means, title, or procurement, it is sufficient proof of the breach to show an entry by A.'s wife, in whose name A. purchased jointly with his own. *Butler v. Swinerton*, Palm. 339. So, in the case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant. Godb. 333; Palm. 340. So, the appointee of A., by virtue of a power in the making of which A. concurred, is a person claiming under him. *Hurd v. Fletcher*, 1 Doug. 43; *Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78. So, where A., seised in fee, settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest, by, from, or under him, the eldest son was held to be a person claiming under the lessor. *Evans v. Vaughan*, 4 B. & C. 261. Where the covenant is that the defendant has not done, permitted, or suffered any act, &c., the assenting to an act which the covenantor could not prevent is not a breach. *Hobson v. Middleton*, 6 B. & C. 295; *Thackeray v. Wood*, 6 B. & S. 766; 34 L. J., Q. B. 226. But, where a mortgagee who has entered into a similar covenant, was party to a deed whereby the mortgagor created an incumbrance on the mortgaged land, this is a breach of the covenant; see *Clifford v. Hoare*, L. R., 9 C. P. 362. A covenant for quiet enjoyment "acquitted of all grants, rents," &c., is broken by the existence of a quit rent, incident to the tenure, and due to the lord of the manor, though none was in arrear at the time of the conveyance. *Hammond v. Hill*, Comyn, 180. A covenant against interruption by the vendor, or his act or defaults, extends to arrears of quit rent due while the vendor was in possession and unpaid by him, though it may have become due before he held the estate. *Howes v. Brushfield*, 3 East. 491. Entry on a lessee and distress for land-tax, due from lessor before the demise, is not a breach of covenant for quiet enjoyment, without disturbance by the lessor, or any one claiming by, from, and under him; for that is not a claim under him, but a claim against him. *Stanley v. Hayes*, 3 Q. B. 105. But *semb.* the plaintiff might have paid the tax and sued for money paid. *Vide ante*, p. 533. The entry of the party, claiming lawful title, is not less a breach of covenant because the covenantee, who sues, may have instigated him to enforce the claim. *Young v. Raincock*, 7 C. B. 310. Merely forbidding the plaintiff's tenant to pay his rent, is not a breach of the covenant for quiet enjoyment.

Witchcot v. Nine, 1 Bowl. 81. A legal proceeding interfering not with the possession, but with a particular mode of enjoyment of land, as its use as a beershop, is not a breach of the covenant. *Dennett v. Atherton*, L. R., 7 Q. B. 316, Ex. Ch.; see *Porter v. Drew*, 5 C. P. D. 143.

A covenant not to use lands for certain specified trades, does not imply a warranty that it may be used for all other trades. S. C.

In a conveyance of land from A. to B., A. covenanted with B. for title and quiet enjoyment, notwithstanding any act or thing done, or suffered by him, or any of his ancestors or predecessors in title: by a subsequent decree in Chancery, which bound B., although not a party to the suit, the land was declared subject to rights of common; this decree was in the absence of any actual disturbance of B. in his possession held no breach of the covenant for quiet enjoyment; nor, in the absence of evidence of a grant of common, by A.'s predecessors in title, was it a breach of the covenant for title. *Howard v. Maitland*, 11 Q. B. D. 695, C. A.

For an instance of a qualified covenant for title, where a house is granted with appurtenances, as usually enjoyed therewith, see *Thackeray v. Wood*, ante, p. 658. As to breach of quiet enjoyment of stalls in a theatre, see *Leader v. Moody*, L. R., 20 Eq. 145. As to the effect of a want of title, which is disclosed by the plaintiff's deed of purchase, see *Hunt v. White*, 37 L. J., Ch. 326.

The defendant granted the plaintiff a lease he had no power to grant. The plaintiff obtained a fresh lease, from the person having good title, and in an action against the defendant, on the covenant for quiet enjoyment, he was held entitled to recover the difference in the expenses and value of the void and of the valid lease. *Lock v. Furze*, 19 C. B., N. S. 96; 34 L. J., C. P. 201; L. R., 1 C. P. 441, Ex. Ch. So, where defendant demised premises to the plaintiff, and covenanted that the plaintiff should occupy them, through the term, without any interruption, from the defendant, or any person claiming under him; an action of trespass was brought against the plaintiff by C., who claimed under the defendant, and the plaintiff gave notice of this action to the defendant, but the defendant took no notice thereof; the plaintiff then defended the action, and a verdict was recovered against him; it was held, that the plaintiff was entitled to recover against the defendant the amount of the verdict and costs, he was so compelled to pay, together with his cost of defence, and compensation for the loss of the land, and the value of a conservatory he had erected on the land. *Rolph v. Crouch*, L. R., 3 Ex. 44. See also *Williams v. Burrell*, 1 C. B. 402, and *Godwin v. Francis*, L. R., 5 C. P. 295, cited ante, p. 443. Where there had been no eviction, only such damages were recoverable as the plaintiff had sustained at the date of the writ. *Child v. Stenning*, 11 Ch. D. 82, C. A. In such case, however, the damages would now, under O. xxxvi, r. 58, ante, p. 284, "be assessed down to the time of assessment."

Where a breach is not assigned in the words of the covenant merely, but goes on to particularize the sort of breach, that alone must be proved; *Harris v. Mantle*, 3 T. R. 307; unless the judge shall authorize an amendment on the trial by striking out words of needless particularity, ante, p. 650. Where the breach of a covenant for enjoyment specifies an entry and expulsion by the defendant, it is not enough to prove a refusal, by the defendant, to let the plaintiff take possession. *Hawkes v. Orton*, 5 Ad. & E. 367. But where the first part of the breach, contains the gist of the action, the plaintiff need not prove superfluous matter of aggravation. *Defell v. Brocklebank*, 4 Price, 36.

The plaintiff may assign a breach, on the implied covenant for quiet enjoyment contained in the word *demise*; Com. Dig. Cov. (A. 4); *Shep. Touch.* 160; or let; *Mostyn v. W. Mostyn Coal & Iron Co.*, 1 C. P. D. 145;

in a lease under seal these words imply a power to lease, and hence to support the action, it is not necessary that the lessee should be actually evicted; 1 Wms. Saund. 322 a, (2); but the implied covenant ceases if the estate out of which the lease is granted. *Adams v. Gibney*, 6 Bing. 60; see *Penfold v. Abbott*, 32 L. J., Q. B. 67; and is restrained by an express covenant for quiet enjoyment. *Line v. Stephenson*, 4 N. C. 678, Ex. Ch. N. C. 183; *Stannard v. Forbes*, 6 Ad. & E. 572; *Dennett v. Atherton*, L. R. 7 Q. B. 316, Ex. Ch. A warranty, of the demise by the lessor, is not an implied covenant, but an express one, and extends to the whole term granted. *Williams v. Burrell*, 1 C. B. 402.

In a demise by parol there is an implied contract for quiet enjoyment, but not for good title. *Bandy v. Cartwright*, 8 Exch. 913; 22 L. J. Ex. 285 and xl. note; *Hall v. City of London Brewery Co.*, 2 B. & S. 737; 22 L. J., Q. B. 257. See *Cross v. Warter*, 5 W. N. 1873, p. 137, E. T. Q. B. But, in an agreement for a lease there is no contract for quiet enjoyment. *Brashier v. Jackson*, 6 M. & W. 549; it is, however, an implied condition that the lessor has a good title to let for the proposed term, and he is liable for a breach of this condition. *Stranks v. St. John*, L. R., 2 C. P. 376.

[Breach of covenant to yield up possession of premises at end of term.] A covenant to this effect is usually to be found in leases; but even in the absence of such a covenant, "when a lease is expired the tenant's responsibility is not at an end, for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable, for the lessor is entitled to receive the absolute possession at the end of the term." *Harding v. Crethorn*, 1 Esp. 57, per Ld. Kenyon; approved in *Christy v. Tancred*, 7 M. & W. 127, 130, per Park. B. The same rule applies in the case of a tenancy under a parol agreement for a lease. *Henderson v. Squire*, L. R., 4 Q. B. 170. The landlord is entitled to recover all the loss he has sustained, by not being put in possession of the entire premises, at the end of the term; he is entitled to a sum equivalent to the rent he has lost, and to the costs of an ejectment against an under-tenant, who was wrongfully held over. S. C. So, the lessor may recover for damages occasioned by having to compromise an action, by a person (to whom he had let in reversion), for not giving possession, together with the costs of such action; and his acceptance of rent for the time held over is no answer. *Bramley v. Chesterden*, 2 C. B., N. S. 592; 27 L. J. C. P. 23.

ACTION FOR DOUBLE VALUE OF LAND DEMISED.

By statute 4 Geo. 2, c. 28, s. 1, in case any tenant for life, lives, or years, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant, shall wilfully hold over any lands, &c., after the determination of such term, and after demand made, and notice in writing given, for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or the reversion of such lands, &c., shall belong, or his agent thereunto lawfully authorized, such person so holding over shall, for the time he shall so hold over or keep the person entitled out of possession of the said lands, &c., pay to the person so kept out of possession, his executors, administrators, or assigns, at the rate of double the yearly value of the lands, &c., so detained, for so long a time as the same are detained, to be recovered by action of debt in one of the Queen's Courts of Record.

The landlord may also sue for a breach of the implied agreement to give up possession of the premises at the end of the term. *Vide ante*, p. 660.

Proof of the demise.] Tenants in common could not sue jointly in this action, where there was no joint demise by them. *Wilkinson v. Hall*, 1 N. C. 713. Nor could husband and wife sue jointly on a parol demise, by the husband alone, of land whereof he is seised in right of his wife, but the action must be brought by the husband alone. *Harcourt v. Wyman*, 3 Exch. 817. But such misjoinder is not now material, *vide ante*, pp. 86, 87. A., the lessor of defendant, required delivery of the premises at Lady-day, when the lease ended, and then made a lease in reversion to B.; defendant held over, and did not recognize B. as landlord: held that A., and not B., was the proper person to sue. *Blatchford v. Cole*, 5 C. B., N. S. 514; 28 L. J., C. P. 140. A weekly tenant is not liable to the action. *Lloyd v. Rosbee*, 2 Camp. 453.

Proof of the determination of the term, and of the demand.] In general, the determination of the term, will be proved by evidence of the service of a notice to quit upon the defendant; and if such notice be proved, it will not be necessary to show a demand; for the notice includes a demand. *Wilkinson v. Colley*, 5 Burr. 2694. A notice to quit, containing a threat of requiring double rent on refusal, is sufficient. S. C. As to proof of the notice or demand, see *ante*, pp. 8, 14, and cases cited *post*, *Action for recovery of land.—By landlord.* The statute requires it to be in writing. Where the defendant has held over after the determination of a term certain, a demand in writing of the possession must be proved; but it need not appear that the demand was made immediately upon the expiration of the tenancy. *Cobb v. Stokes*, 8 East, 361; though the plaintiff will only be entitled to the double value from the time of the demand made. And where the rent is reserved quarterly, and the demand is made in the middle of the quarter after the expiration of the tenancy, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter. S. C. Where the notice was served upon a tenant, a feme sole, who married before the expiration of the year, it was held that the landlord might maintain debt against the husband, without making a demand of the possession from him; and that in such action it was not necessary to join the wife for conformity. *Lake v. Smith*, 1 N. R. 174. A person appointed by the Court of Chancery to receive the rents and profits of the estate, is a sufficient agent within the statute to make the demand in his own name. *Wilkinson v. Colley*, *supra*. Where a trustee joined with *cestui que trust* in a mortgage to the plaintiff, and all parties joined in appointing G. to be the agent and attorney of the *cestui que trust* to demand and collect rent, to give notice to quit, &c., and to do everything that the *cestui que trust* could have done before the mortgage, it was held that G. was authorized to demand within the statute. *Poole v. Warren*, 8 Ad. & E. 582.

Value.] In estimating the value, only the land and its real easements and appurtenances can be included. Thus, where the owner of a mill let part of it to the defendant, with the use of the revolving shaft of a steam-engine, which passed through the part demised, at an entire rent, the value of the power was excluded. *Robinson v. Learoyd*, 7 M. & W. 48. Generally speaking, the rent, if a rack-rent, will represent the value; but the unwillingness of the tenant to quit may sometimes be evidence of a greater value.

Defence.

It has been usual in this action to traverse the specific allegations in the statement of claim; but as the action is in the nature of a penal one, it has been suggested that the plea of Not guilty, by statute (*post*, p. 667) is sufficient to put the plaintiff on proof of the whole statement of claim. See *Jones v. Williams*, 4 M. & W. 375. *Contra*, *Castleman v. Hicks*, 2 M. & Rob. 422, *cor.* Coleridge, J., *post*, p. 668.

The defendant may show that the plaintiff has waived the notice to quit or demand of possession, and, where the plaintiff has accepted rent from the defendant after the expiration of notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value, or as a waiver of it. *Ryall v. Rich*, 10 East, 52. Such waiver need not be specially pleaded. *Rawlinson v. Marriott*, 16 L. T., N. S. 267. Mellor, J. Where the landlord declared in debt, first for the double value, and secondly for use and occupation, and the tenant pleaded *nil debet* to the first count, and a tender of the single rent, before action brought, to the second, and paid the money into court, which the plaintiff took out of court, and proceeded; it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of nonsuit; but that it was a case to go to the jury; and that the plaintiff's going on with the action after taking the single rent out of court was evidence to show that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto* only. *Ryall v. Rich*, *supra*. A recovery of possession in an action, is no waiver of the landlord's right to the double value, for the time between the expiration of the notice to quit, and the time of recovering possession. *Soulsby v. Neving*, 9 East, 310. A tenant who holds over under a fair claim of right, will not be considered as wilfully holding over within the statute, though it may appear eventually that he had no right. *Wright v. Smith*, 5 Esp. 203. A tenant who, during proceedings as to the validity of a devise, made by the lessor, held over, after a notice to quit from the devisee to whom he had in the first instance attorned and paid rent, was held not to have made himself liable to a claim for double value, after the validity of the devise had been established. *Swinfen v. Bacon*, 6 H. & N. 184, 846; 30 L. J., Ex. 33, 368. Where the action is against co-tenants, a statement by one, on receipt of notice to quit, that "he has nothing to do with the land," is not evidence in his favour to show that his holding was not wilful; but if one offers to give up the land, and the other alone holds out, it is doubtful whether the action will lie against both. *Hirst v. Horn*, 6 M. & W. 393.

Statute of Limitations.] This double value being in the nature of a penalty can only be recovered within two years of the time the cause of action accrued. 3 & 4 Will. 4, c. 42, s. 3, *post*, p. 667.

ACTION FOR DOUBLE RENT.

By stat. 11 Geo. 2, c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant, his executors, or adminis-

trators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c. ; and such double rent or sum shall continue to be paid during all the time such tenants shall continue in possession. The action has usually been in the form of debt.

The notice mentioned in this statute need not be in writing, at least where the tenant holds under an oral demise. *Timmins v. Rowlinson*, 3 Burr. 1603 ; but it must give a fixed time for quitting : thus a notice to quit, "as soon as the tenant can get another situation," does not render him liable on this statute, though he has got another situation. *Farrance v. Elkington*, 2 Camp. 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and actually gives a valid notice sufficient to determine it. *Johnstone v. Huddleston*, 4 B. & C. 922.

This action is not in the nature of a penalty.

ACTION ON BOND.

The statement of claim either states only the penal part of the bond, as in the case of common money bonds, or sets out also the special conditions and alleges breaches. The allegation of breaches is obligatory on the plaintiff by stat. 8 & 9 Will. 3, c. 11, s. 8, either in the statement or reply, by way of assignment, which is traversable ; or, in certain cases, by way of suggestion, which is not traversable, but must be proved in order to obtain an assessment of damages. Neither the J. Acts, 1873, 1875, nor the Rules, 1883, materially affect the procedure on bonds. Where breaches are not assigned in the statement of claim, the defendant must now set out the condition as part of his defence, if he intends to plead performance. Where issue is joined on the alleged breaches, the proof will of course depend on the allegations traversed. Where breaches are suggested, then the evidence will be as on a writ of inquiry, except that the truth of the breaches, as well as the damages, will then have to be inquired into, and thereupon the defendant may controvert the breaches or any of them ; but he cannot show excuse of performance, for that might have been pleaded by him at first. See *Canterbury, Archbishop of, v. Robertson*, 1 Cr. & M. 690 ; *Webb v. James*, 8 M. & W. 645.

Where the breaches have been suggested after judgment for the plaintiff, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained ; for this purpose it will be sufficient if the solicitor for the plaintiff testifies that the bond produced is the instrument delivered to him to bring the action on, and that he knows of no other of the same date ; and the bond need not be strictly proved. *Hodgkinson v. Marsden*, Peake, Ev. 5th ed. 287 ; 2 Camp. 122. Where the defendant on *oyer* set out the condition, which was for performance of covenants in an indenture of lease, and pleaded a plea of judgment recovered, on which there was judgment for the plaintiff ; on the execution of the writ of inquiry, *Ld. Kenyon* ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped from denying it. *Collins v. Rybot*, 1 Esp. 157. If the defendant lets judgment go by default, and the plaintiff thereupon makes his suggestion of breaches in which he sets

out the condition of the bond, which appears to be for the performance of an award, or of articles of agreement, or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone, coram Lawrence, J.*, 1 Wms. Sess. 58 f (1). But, where the breaches are *assigned*, and not denied, the truth of them is not in issue.

As to stamps on bonds, *vide ante*, p. 232.

Damages.] The jury are to find nominal damages and costs, as well as damages on the breaches, but the plaintiff cannot recover more than the amount of the penalty and costs. *Wilde v. Clarkson*, 6 T. R. 303; *Bramcombe v. Scarbrough*, 6 Q. B. 13.

Where a certain sum is due from A. to B., and they agree that A. shall in satisfaction thereof, pay a lesser sum on a given day, and in default of payment, the whole original debt shall at once become payable, B. is entitled on default to recover the debt. *Hudson v. Thompson*, L. R., 4 H. L. 1. So where the debt is to be repaid by instalments, and the whole becomes payable on default in payment of one instalment. *Protector Endowment, &c. Co. v. Grice*, 5 Q. B. D. 592, C. A.; *Wallingford v. Mutual Society*, 5 Ap. Ca. 685, D. P.

Defence.

Denial of execution.] This defence has the same effect as in actions of covenants, as to which see *ante*, p. 636.

The defendant may be sued by the name in which he executed the bond; but he may also, it seems, be sued by his real name; for where the writ was against W. B., and the declaration called him "W. F. B., sued by the name of W. B.," and the bond was executed by the defendant W. F. B. in the name of W. B. by which he was then known, it was held no variance; and it was also held that, if the wrong name had avoided the bond, it should have been specially pleaded. *Williams v. Bryant*, 5 M. & W. 447.

Alteration of the bond.] The cases relating to the alteration of bonds, are collected with those relating to simple contracts, *ante*, p. 588.

Payment.] Payment before the day fixed for it was always evidence of a plea of payment at the day. B. N. P. 174. But before stat. 4 & 5 Anne, c. 3 (c. 16, Ruff.), s. 12, payment after the day fixed, or at a different place from that fixed, was not pleadable in bar. By that act payment of principal and interest, due on a mere money bond, made before action, is a bar, though not made exactly according to the condition. A tender, without acceptance, after the day, is not within the statute, and therefore no bar. *Underhill v. Matthews*, B. N. P. 171. But see *per* Abbott, C. J., in *Murray v. Stair, El. of*, 2 B. & C. 92. Though the Statute of Limitations, 21 Jac. 1, c. 16, did not apply to specialties, yet the defendant might, if the deed was 20 years old, and there had been no payment of interest or acknowledgment of liability, within that period, have pleaded *solvit ad diem*, and relied upon the presumption of payment arising from lapse of time. But, if there had been any such payment of interest or acknowledgment, after the day appointed for the payment of the money, though upwards of 20 years had elapsed since the payment or acknowledgment, the defendant could not avail himself of this presumption of payment, under the plea of *solvit ad diem*, though he might under the plea of *solvit post diem*, given by

the statute 4 & 5 Anne, c. 3, *ante*, p. 664. *Moreland v. Bennett*, Str. 652 ; B. N. P. 174; see further, on presumption of payment, *ante*, p. 36.

In an action on a common money bond or on an annuity bond, it rests on the defendant to prove a defence of payment, although such defence is in fact a denial of the breach of the condition. *Penny v. Foy*, 8 B. & C. 8, 13.

Fraud.] *Vide ante*, p. 590.

Statutes of Limitations.] *Vide ante*, pp. 638, *et seq.*

ACTION ON REPLEVIN BOND.

The procedure in granting replevin bonds is now regulated by the County Courts Act, 1856 (19 & 20 Vict. c. 108).

By sect. 63, the powers and responsibilities of sheriffs with respect to replevin bonds and replevins have ceased, and the county court registrar of the district in which the distress was taken, is authorized to "approve of" replevin bonds, to grant replevins, and to issue all necessary process in relation to them, to be executed by the high bailiff. By sects. 64, 65, the registrar, at the instance of the party, takes security (in a bond with sureties, sect. 70 (*infra*); or a pecuniary deposit, sect. 71), conditioned to commence an action in one of the superior courts, therein named, within a week after the date of the security, and to prosecute it with effect and without delay, and (unless judgment be by default) to prove to such court that the obligor had good ground for believing either that the title to some hereditament, toll, market, fair, or franchise was in question, or that the rent or damage exceeded 20*l.*, and to make return of the goods, if the return be adjudged.

Sect. 66 provides for prosecuting the suit in the county court on a like security, with a condition to prosecute it within one month with effect and without delay, and to make return, &c.

By sect. 67, the defendant may remove a replevin suit out of the county court by *certiorari* on giving security, by like bond, approved of by the master of the court, to "defend with effect" and (except in case of discontinuance, non pros. or nonsuit) to prove that he had good ground for believing either that the title to some hereditament, toll, &c., was in question, or that the rent or damage, in respect whereof the distress was taken, exceeded 20*l.*

By sect. 70, the security is in the form of a bond with sureties "to the other party or intended party in the action or proceeding:" the court in which the action is brought may give relief to the obligor by rule or order which shall have the effect of a defeasance of the bond. By the C. L. P. Act, 1860, ss. 23, 24, the plaintiff in replevin might, in answer to an avowry, pay money into court, and such payment is not to work a forfeiture of the bond. These sections are repealed by stat. 46 & 47 Vict. c. 49; the Rules, 1883, do not, however, make any provision for payment into court in replevin, as O. xxii. rr. 1, 9, *ante*, p. 72, do not apply; it seems, therefore, that the same practice remains in force, see O. lxii. r. 2, *ante*, p. 1, n. A new procedure, where goods are detained under a lien, is given by O. l. r. 8.

The above provisions entirely extinguish the functions of the sheriff in replevin, and are much more extensive than the provisions of the former County Courts Act, 1846 (9 & 10 Vict. c. 95), ss. 119-121. They have made many of the reported decisions on this head of little or no value.

Denial of execution.] This defence only puts in issue the due execution of the bond by the defendants. *Vide ante*, p. 636.

The forms of bond prescribed by the County Court Rules, 1875, Sched. Nos. 183, 184, show an attesting witness annexed. Whether this will oblige the plaintiff to produce him is a question already noticed, *ante*, p. 126. The act requires no such attestation.

The approval of the security by the county clerk, or other officer, is recited in the bond, and is, therefore, it seems, admitted by the obligors.

The bond requires no stamp : *vide ante*, p. 233.

Forfeiture of the bond.] Where the bond is to prosecute in a superior court, the defendants may have to show, besides the due prosecution of the replevin suit, &c., that the plaintiff in replevin satisfied the court at the trial (if there was one) that he had good ground for belief that title was in question, or that the rent or damage exceeded 20*l*. For this purpose, it should seem that the plaintiff in the replevin suit should prove or produce some declaration or certificate to that effect by the judge who tried it; see *Tunncliffe v. Wilmot*, 2 Car. & K. 626, where the certificate was refused by Patteson, J., on particular grounds; see *post*, *Action of replevin.—Damages*.

With regard to the prosecution with effect and without delay, the old decisions appear to apply. Thus to prosecute "with effect" means to a "not unsuccessful termination." *Jackson v. Hanson*, 8 M. & W. 477; *accord*. *Tummons v. Ogle*, 6 E. & B. 571; 25 L. J., Q. B. 403. The obligation to prosecute "without delay" is broken by not proceeding with due diligence, though the suit is not thereby determined. *Harrison v. Wardle*, 5 B. & Ad. 146. And it is no defence that the delay was justified by the practice of the court, or by successive orders for time to deliver statement of claim; but the jury may find delay notwithstanding. *Gent v. Cutts*, 11 Q. B. 288. The abatement of the suit by death of the distrainee is a sufficient excuse. *Morris v. Matthews*, 2 Q. B. 293.

Damages.] The verdict is taken for the amount of the penalty; and this, it seems, with costs of suit, still limits the amount that can be afterwards actually recovered from the defendants. *Branscombe v. Scarbrough*, 6 Q. B. 13.

ACTION FOR PENALTY.

Actions on statutes for penalties have been usually in the form of actions of debt. In some cases that form is prescribed by the statute; in other cases, where no form is specified, the penalty has been treated as a statute debt when incurred, though not strictly referable to any contract. In the statement of the offence it is sometimes necessary to allege a contract, and such contract must then be proved as laid. But variances in such actions are amendable, and will be amended where justice requires.

In an action of debt on a penal statute the general evidence for the plaintiff is—proof of the commission of the act upon which the penalty has accrued, and if a time be limited by the statute for bringing the action, proof that the action was brought within the time. Evidence of the locality of the cause of action is no longer material at the trial, unless otherwise provided by the statute imposing the penalty. *Vide ante*, pp. 88, 89.

As to the *onus* of proof, where the penalty arises from the commission of

an act without legal qualification, the existence of which qualification is peculiarly within the knowledge of the defendant, *vide ante*, pp. 89, *et seq.* In a penal action under an old act for exercising a trade, without having served an apprenticeship, the plaintiff was not compelled to prove that the defendant used the trade all the time laid in the declaration; it being averred that he forfeited 40s. for each month. *Powell v. Farmer*, Peake, 57. In *Hodkinson v. Mayer*, 6 Ad. & E. 194, it was held that an attorney, who practised in a county court, after having omitted for a year to take out his certificate, was not liable to penalties under statute 12 Geo. 2, c. 13, s. 7, as a person practising in the county court, without having been legally admitted according to stat. 2 Geo. 2, c. 23. A person, being deputy clerk of the peace, and acting as attorney, was not liable to penalties under 22 Geo. 2, c. 46, s. 14, if he abstained from the actual exercise of his office. *Faulkner v. Chevell*, 10 Ad. & E. 76.

The crown alone can sue for the penalty where the statute does not say who shall recover it, unless an interest therein is given to some person by the statute, expressly or by sufficient implication, as if it is created for the benefit of a party grieved. *Clarke v. Bradlaugh*, 8 Ap. Ca. 354, D. P. It is not necessary to prove an authority from the crown or the person entitled to the penalties. *Cole v. Coulton*, 2 E. & E. 695; 29 L. J., M. C. 125. A corporation cannot maintain the action unless empowered to do so by statute. *S. Leonards, Guardians of, v. Franklin*, 3 C. P. D. 377.

Evidence of commencement of the action.] The writ is, in all cases, the commencement of the action, and the statement of claim will show the day on which it is issued; but where the writ has been renewed, strict proof of the continuance of the writ is requisite. *Vide ante*, p. 601, 602. Where the writ is dated on the day on which the penalty was incurred, evidence is admissible to prove that it issued after the cause of action accrued. *Clarke v. Bradlaugh*, 8 Q. B. D. 63, C. A., reversed in D. P. 8 Ap. Ca. 354, on another ground.

By 31 Eliz. c. 5, s. 5, actions or suits for forfeitures on a penal statute, limited to the Queen, must be brought within two years after the cause of action; and actions for penalties given to a common informer, suing *qui tam*, must be brought within one year. In *Dyer v. Best*, L. R., 1 Ex. 152, overruling *Calliford v. Blawford*, 1 Show. 353, this section was held to limit an action for a penalty, brought by an informer suing for himself alone, to one year; this decision was, however, disapproved by Bramwell, L. J., in *Robinson v. Currey*, 7 Q. B. D. 465, 471.

By 3 & 4 Will. 4, c. 42, s. 3, all actions for penalties, damages, or sums of money given by existing or future acts to parties grieved, must be brought within two years after the cause of action. An officer of the Goldsmiths' Company suing for penalties under statute 7 & 8 Vict. c. 22, s. 3, is not a party grieved within this Act. *Robinson v. Currey*, 7 Q. B. D., 465, C. A.

Defence.

By 21 Jac. 1, c. 4, s. 4, "if any information, suit, or action shall be brought or exhibited against any person or persons, for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the king, or by any other, or on behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter, being pleaded, had been a good and sufficient matter in law to have discharged the said de-

defendant or defendants, against the information, suit, or action, and the said matters shall be then as available to him or them, to all intent and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar, or discharge of such information, suit, or action." This right to plead not guilty by statute is reserved by Rules, 1883, O. xix., r. 12, *ante*, p. 283; by that rule, that defence shall have the same effect as it before had.

O. xxi. r. 19, *ante*, p. 284, requires the defendant when relying on the above section to insert in the margin of the defence the words "By Stat. 21 Jac. 1, c. 4 (Public Act), s. 4," otherwise such defence will be taken not to have been pleaded by virtue of the statute. See further on this rule, *post*, Part III. *Actions against constables*.

This section applies to actions on statutes subsequent, as well as prior to its being passed. *Spencer, El., v. Swannell*, 3 M. & W. 154; *Jones v. Williams*, 4 M. & W. 375.

To an action for treble damages for pound breach, on 2 W. & M., sess. 1, c. 5, s. 3 (s. 4, Ruff.), the defendant cannot plead "not guilty by statute," for it is not a penal action within 21 Jac. 1, c. 4. *Castleman v. Hicks*, 2 M. & Rob. 422. See, however, *Jones v. Williams*, *supra*.

The effect of bringing an action for a penalty is to make it a debt due to the plaintiff, and judgment obtained in a subsequent action at the suit of another person is no bar to the prior action. *Hutchinson v. Thomas*, 2 Lev. 141; *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137. A prior action, however, brought by a person in collusion with the defendant, to prevent a recovery, at the suit of a *bona fide* plaintiff is no defence, and the fraud may be replied. S. C. As to what amounts to collusion in such a case, *vide* S. C. & S. C. in C. A. 4 Ex. D. 107.

The recovery of a penalty, by an informer, against a person for keeping a house for music and dancing without a licence under 25 Geo. 2, c. 36, s. 2, is a bar to a recovery of a second penalty against the same defendant, at the suit of another informer, although the offence is committed on several successive nights. *Garrett v. Messenger*, L. R., 2 C. P., 583.

No damages are recoverable in a penal action, except the penalty. *Fredrick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibly*, Id. 2489.

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